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MANDATORY MINIMUM PENALTIES: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures

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The views expressed in this report are those of the authors and do not necessarily represent the views of the Department of Justice Canada.

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1.0 Introduction

It has been said that mandatory punishments are as old as civilization itself. The biblical *lex talionis* – an eye for an eye, a tooth for a tooth – was mandatory, leaving little room for clemency or mitigation of punishment. Mandatory penalties were also enshrined in early Anglo Saxon law, prescribing set fines for every conceivable form of harm (Wallace, 1993). In the United States, mandatory minimum sentences (MMS) date back to 1790 and, since the 1950s, have evoked considerable ambivalence. In American federal law today, over 60 statutes contain MMS, although only four, covering drug and weapons offences, are used with any frequency (Wallace, 1993).

By 1999, The *Criminal Code of Canada* contained 29 offences carrying MMS (Appendix A). Nineteen of these offences were created in 1995 with the enactment of Bill C-68, a package of firearms legislation. MMS appear to be increasing in popularity with Members of Parliament, as shown by the number of private members' bills introduced in the 1999 session (Appendix B). This review was prompted by the increasing interest in MMS, as well as by the controversy surrounding them. The principal aim was to assess the effects of MMS through a review of relevant social science and legal literature.

Several arguments have been advanced in favour of MMS. Proponents believe that these penalties act as a general or specific deterrent; that is, they dissuade potential offenders from offending or actual offenders from re-offending. They also claim that MMS prevent crime by incapacitating or removing the offender from society. Furthermore, MMS may serve a denunciatory or educational purpose, by communicating society's condemnation of given acts. Moreover, MMS are thought to reduce sentencing disparity.

Opponents assert that MMS have little or no deterrent or denunciatory effect. They also maintain that the rigid penalty structure limits judicial discretion, thereby preventing the imposition of just sentences. Furthermore, there is the concern that the rigidity of MMS may result in some grossly disproportionate sentences. In addition, opponents assert that MMS can make it difficult to convict defendants in cases where the penalty is perceived as unduly harsh. Moreover, there is a concern about the fiscal consequences of these penalties, as they may increase the burden on prosecutorial resources and produce substantial increases in prison populations. Finally, MMS may exacerbate racial/ethnic biases in the justice system if they are applied disproportionately to minority groups.

The primary aim of this review was to assess the utilitarian aspects of MMS; that is, the crime preventive, fiscal, and social consequences of MMS, as well as impediments to their implementation. This review did not consider constitutional/Charter issues raised by these penalties.

2.0 Scope of the Review

This review covered the period from 1980 to 2000 inclusive, although several earlier studies were included due to their salience. The databases searched included *Current Contents*, *Soc Abstracts*, *PsycINFO*, and *Legal Trac*. Dozens of key words were used in the searches including various combinations of the following: *mandatory sentences, mandatory minimum penalties, deterrence, incapacitation, denunciation, homicide, murder, impaired driving, drugs, firearms, crimes, offences, disparity, capital punishment*.

Materials cited in this report included empirical studies, as well as commentaries by jurists and prosecutors with extensive first-hand experience with cases eligible for or resulting in the imposition of a MMS.

3.0 Some Theoretical and Conceptual Issues

A principal aim of this review was to assess the utilitarian aspects of MMS, that is, the potential crime preventive benefits of such penalties. As indicated in Section 1.0, these benefits can arise through incapacitation, general or specific deterrence, denunciation, or education (i.e., raising awareness and sensitization). Since penalties already tend to exist in areas where MMS are introduced (e.g., murder, firearms-related crimes, impaired driving), demonstrating that a given MMS has an absolute deterrent or incapacitation effect is insufficient. Sentences for robbery, for example, had a potential preventive effect prior to the introduction of sentence enhancements (MMS in addition to the primary offence) for using a firearm in robberies and other offences. Thus, the *marginal* or additional benefit of MMS over previous penalties must be established (Shavell, 1992).

These marginal preventive effects, in turn, can exist only if MMS actually increase the certainty and/or severity of punishment. If their perceived severity results in fewer guilty pleas and more cases proceeding to trial, the certainty and celerity of their imposition may be diminished relative to sentences imposed previously. Also, MMS do not guarantee that sentence severity will increase, as sentences under a previous sentencing regime may have typically exceeded the minimum penalty introduced. These concerns underscore the necessity of examining the implementation of MMS, as marginal benefits cannot accrue if MMS are circumvented at the prosecutorial stage or fail to result in more certain and severe punishment. This review, therefore, devotes considerable attention to issues in the implementation of MMS.

Even where the marginal preventive effects of MMS are demonstrated, a further difficulty arises with regard to the explanation of these effects. If a "three strikes" law, such as that enacted in California, is accompanied by a sharp decline in felonies over a period of several years, to which utilitarian doctrine do we attribute this finding? It is difficult to distinguish whether the law has proven effective due to deterrence, incapacitation, moral condemnation/sensitization, or some combination of these factors. Few studies try to empirically determine the relative importance of these explanations. As a result, our focus here will be on the impact of MMS, rather than on explaining any effects observed.

An additional issue is that MMS apply to a wide range of sanctions internationally, from mandatory license restrictions and fines for impaired driving to mandatory life sentences and even the death penalty for certain categories of murder. Thus, sweeping statements about the utility of MMS are problematic. Sentences of varying degrees of severity ought to be considered separately. Accordingly, impaired driving, drug, and firearms offences are discussed in different sections of this report.

4.0 Can Offenders be Deterred?

While MMS may serve political ends (placating public indignation about one or more serious crimes) and retributive goals, deterrence is presumably an important aspect of such penalties. Incapacitation alone, whether for retributive or utilitarian reasons, may ultimately prove far too costly to sustain MMS. If there is no deterrent effect, the correctional system is likely to face a crisis due to the continual growth of the prison population. Deterrence offers the hope that any short-term increases in the prison population produced by MMS will be offset by long-term reductions arising from declining crime rates.

A number of recent developments and studies in the field shed light on the potential deterrent effect of prison sentences. Most of these studies relate to legal sanctions and incarceration in general; they do not tend to distinguish between mandatory and other types of penalties.

4.1 The Rational Choice Perspective

The deterministic view that social, biological, and psychological forces shaped behaviour was dominant throughout most of the 20th century. While some criminality undoubtedly is an expression of pure rage and often involves impaired judgment due to intoxicants (Wolfgang, 1958; Innes, 1986), an important development in criminological theorizing over the past two decades has been the emergence of the *rational choice* perspective (Siegel and McCormick, 1999). While not assuming complete rationality (Harding, 1990), proponents regard offenders as active decision-makers, rather than simply as passive actors responding to adverse social conditions and psychological needs. Offender decision-making encompasses a whole range of choices, aside from the decision to commit a crime. Offenders are seen as deciding on the timing and location of their offences, choosing specific targets (whether people or premises), and making decisions about the means (e.g., weapons) they will use to commit their offences. Documented patterns in different crimes show that crimes are not merely committed in a random fashion. Dozens of case studies, often involving interviews with offenders, display their decision-making processes and decision criteria (Clarke, 1997). Studies also show that many offenders are anything but indifferent to the risks, including imprisonment, associated with their crimes (Brown, 1997; Gabor et al., 1987). In this context, risk usually refers to the likelihood of arrest and punishment, rather than its severity. Furthermore, studies in this area show that much crime is committed by a larger pool of individuals responding to situational factors (e.g., opportunities, risks, and transient motives) favourable to crime, rather than simply a smaller group of hardcore offenders (Gabor, 1994).

4.2 Offender Characteristics

A series of studies appears to contradict the view of offenders as rational and of crime as largely opportunistic as they suggest that:

1) Among the strongest correlates of criminality are antisocial attitudes and associates, a history of antisocial behaviour, and antisocial personality, indicating that offenders are strongly predisposed to committing their crimes (Gendreau et al., 1992; Simourd and Andrews, 1994);
2) Only a small proportion of incarcerated offenders are "calculators", carefully weighing the costs and benefits of their crimes (Benaquisto, 2000);
3) Many offenders would prefer to go to prison than face community sanctions and do not differentiate between a prison sentence of three and five years (Spelman, 1995; Petersilia and Deschenes, 1994; Crouch, 1993; Petersilia, 1990);
4) Incarceration does not appear to reduce re-offending as offenders receiving custodial sanctions have recidivism rates similar to those receiving community dispositions (Gendreau et al., 1999).

The apparent contradictions between the rational choice perspective and the more pessimistic studies just cited might be reconciled by the fact that the former applies to a wider pool of offenders and potential offenders, whereas the latter deal with re-offending among a more intractable group of offenders, many of whom have been previously incarcerated. Some evidence does show that those who have been previously punished are the most likely to recidivate (Greenfield, 1985). Thus, criminal sanctions may exercise a greater deterrent effect in relation to those

with limited previous justice system contacts. Incapacitation, on the other hand, may be more effective than the threat of sanctions in dealing with the smaller, hardcore, persistent criminal element that is responsible for a disproportionate amount of crime.

Put negatively, deterrents will be relatively ineffective in dealing with hardcore offenders and incapacitation policies may be wasteful in dealing with those (the population at large) who may commit crimes only occasionally and who respond to the mere threat of sanctions and moral persuasion (von Hirsch et al., 1999). The "offender population" is certainly not monolithic and a key, largely unresolved issue is the proportion of different types of offenders who are, in fact, intractable. It may be that the distribution of hardcore versus occasional offenders is offence specific. For example, more robbers than impaired drivers may qualify as hardcore, committed offenders.

4.3 Evidence on Deterrence and Incapacitation

Research on the deterrent and incapacitative effects of punishment in general can shed some light on the potential preventive effects of MMS. One issue is whether minimum penalties are actually imposed consistently and hence increase the certainty of punishment. Also, assuming that MMS increase sentence length, do potential or actual offenders differentiate between sentences of, say, five and seven years in their decision to commit a crime? Legal sanctions that dissuade the general population from offending are referred to as *general deterrents*, while those dissuading actual offenders from repeating their crimes are called *specific deterrents*. Furthermore, do lengthier sentences continue to provide preventive benefits through incapacitation; or, might they provide diminishing returns, as incapacitated individuals age and other offenders replace them in the illicit marketplace?

4.3.1 Deterrence

There is a voluminous research literature on these matters. Criminal sanctions have been found to carry some deterrent and incapacitative effects (Canadian Sentencing Commission, 1987; Nagin, 1998); however, these effects vary according to a number of factors, including:

1. ***The nature of the crime.*** Deterrent effects may be crime specific. One study, for example, found that the increased certainty of arrest helped lower the burglary rate, while larceny rates were unaffected by police efforts (Zedlewski, 1983);
2. ***The target group.*** The link between the certainty of punishment and crime rates may also vary according to criminal history or race (Greenfield, 1985; Wu and Liska, 1993). More persistent offenders and those who have been punished in the past are less likely to be deterred by the threat of punishment and each ethnic/racial group tends to respond to the arrest probability of members of that group, rather than to society-wide arrest probabilities;
3. ***Moral prohibitions associated with the behaviour.*** Those who will experience shame or embarrassment as a result of their involvement in a crime are less likely to commit that crime (Grasmick, Bursik, and Arneklev, 1993);
4. ***Knowledge of the pertinent sanction.*** The public has little knowledge of the nature and severity of criminal sanctions, including those offences carrying MMS (Canadian Sentencing Commission, 1987). The awareness of legislative change, such as the introduction of a MMS, is an obvious prerequisite to its marginal deterrent effect;
5. ***The certainty of punishment.*** Some studies show that crime rates decline with an increase in the probability of arrest (Tittle and Rowe, 1974; Marvell and Moody, 1996);
6. ***The celerity or swiftness of punishment*** (Howe and Brandau, 1988). While little evidence exists in relation to this factor, learning theories suggest that the more swiftly punishment follows a crime, the lower the likelihood that the crime will be repeated;
7. ***The severity of the sanction.*** While some studies show that tough sanctions carry a deterrent effect (Green, 1986), the evidence relating to this factor is mixed at best;
8. ***Perceptions of the risk of incurring the sanction*** (Klepper and Nagin, 1989). Generally, those who believe they are likely to be caught and punished will be less likely to commit a criminal act.

The many factors shaping the potential deterrent effect of criminal sanctions preclude simplistic, sweeping generalizations affirming the presence or absence of a deterrent effect. The evidence bearing on the issue of deterrence is very complex and incomplete. Hence, extreme positions either denying the existence of any deterrent effect of legal sanctions or suggesting that everyone can be deterred reflect entrenched ideological positions, rather than the empirical evidence.

The research on both sentence certainty and severity are relevant to MMS and, on balance, the evidence suggests that severity may be less critical to deterrence than initiatives boosting the certainty of punishment (Miller and Anderson, 1986; von Hirsch et al., 1999). In fact, these elements often operate at cross-purposes as actors within the criminal justice system have been known to circumvent laws they believe are draconian by failing to charge or by refusing to convict guilty defendants (Ross, 1982). Thus, excessively harsh penalties may undermine the certainty of punishment by reducing the risk of incarceration. Conversely, increases in the certainty of imprisonment can produce compensating reductions in sentence lengths. A US study of incarceration in six states found that, for drug offences and robbery, an increase in one was compensated for by reductions in the other (Cohen and Canela-Cacho, 1994). As prison capacity, at any time, is finite, increasing the rate of incarceration for one group of offenders may necessitate shorter sentences or early releases of other offenders. There may be important lessons here with regard to MMS.

As MMS often apply to repeat offenders, research on *specific deterrence*, the extent to which known offenders respond to the threat and experience of punishment, is particularly relevant. The high recidivism rates generally found among former prisoners and studies of the impact of custodial sanctions on young offenders leave little room for optimism regarding specific deterrence (Siegel and McCormick, 1999:). The specific deterrent effect may be limited, but it is not nil. A study of career armed robbers who had abandoned their life in crime revealed that one of the key factors underlying their decision was a desire to avoid further incarceration (Gabor et al., 1987). For some offenders, at least, there may be a point at which they tire of punishment and its associated privations.

A survey of 1,000 convicted felons suggests that even serious offenders do not become completely inured to the effects of punishment (Horney and Marshall, 1992). The study revealed that subjects with higher arrest ratios (self-reported arrests to self-reported crimes) also reported higher risk perceptions, indicating that active offenders may learn from their offending experience. In turn, those believing that they face higher risks in lawbreaking have been found to commit fewer crimes (Nagin, 1999).

Public awareness of sanctions is also critical to their value as a deterrent. People will not be deterred by a sanction about which they have little knowledge. The Canadian Sentencing Commission's (1987) research suggests a lack of awareness of sentencing laws and practices in Canada, especially in relation to MMS. The Latimer case illustrates this point as the jury was unaware that murder in this country carries a mandatory life sentence.

4.3.2 Incapacitation

At first glance, estimating the crime preventive effects of incapacitating offenders appears simple enough. The average annual number of offences per offender must be multiplied by the number of people in custody. Unfortunately, the problem is complex, owing in part to enormous variations in the estimation of individual offending rates. Estimates using arrest records range between 8 and 14 index crimes per year on the street, while estimates from self-report studies demonstrate a greater variation still. Robbers are estimated to average between 5 and 75 robberies per year and burglars are estimated to commit an average of 14 to 50 burglaries per year (Nagin, 1999). Zimring and Hawkins (1995) report that estimates of the number of crimes prevented per year in prison ranges from 3 to 187. Even the low-end estimates suggest that incapacitation prevents large numbers of crimes.

Nagin points out, however, that the averages are skewed by a small number of individuals who commit extraordinarily high numbers of offences. Visher (1986), for example, found that five percent of robbers committed 180 or more robberies per year. Thus, incapacitating the remaining 90% to 95% of offenders will yield a much lower crime preventive benefit than that suggested by the mean offence rate. Then there are issues of diminishing returns with age, offender replacement in relation to offences meeting a demand (e.g., drug dealing) and those committed in groups, and the possibility that incapacitation merely delays rather than disrupts criminal careers (Vitiello, 1997).

It has been estimated that, in 1975, 32.9% of potential violent offences were prevented nationally (in the US) due to incapacitation alone (Cohen and Canela-Cacho, 1994). By 1989, the near 200% increase in prison inmates, according to these authors, had prevented just an additional 9% of violent offences, for a total of 41.9%

of potential offences. The marginal benefits of imprisonment decline with age and once most of the high rate offenders have been confined. A study applying a mathematical model estimating the effects of incarceration has corroborated this point by finding that crime levels are quite insensitive to the size of the prison population (Greene, 1988).

The most cost effective method of incapacitation would involve the allocation of prison resources more selectively, through the early identification of the most active offender group – *selective incapacitation*. Selective incapacitation, however, has drawn fierce criticism on both ethical and pragmatic grounds. From an ethical standpoint, sentencing exclusively according to risk is said to violate fundamental legal principles by allocating punishment on the basis of expected future behaviour (Dershowitz, 1973), undermines proportionality in sentencing (Capune, 1988), and would likely be applied disproportionately to various social groups (e.g., minorities, the young) (Capune, 1988; Gabor, 1985).

Practically speaking, the prediction enterprise is essentially unable to identify high-rate career offenders prospectively (in advance) (Petersilia, 1980; Greenberg and Larkin, 1998). Also, studies attempting to predict offender risk tend to have false positive rates (i.e., over predictions of dangerousness) of over 50% (Auerhahn, 1999). Furthemore, it is believed that many high rate offenders are already incapacitated under existing sentencing practices, thereby limiting the potential gains under a selective incapacitation policy (Beres and Griffith, 1998; Nagin, 1998). In any event, MMS tend to adopt a *collective* rather than *selective* incapacitation approach, as they are usually triggered by specific or repeat offences, rather than offender-specific risk related attributes.

Finite prison space has implications for both incapacitation and deterrent effects. As it is difficult to simultaneously increase both the rate of incarceration and the length of prison sentences, the respective benefits of each must be considered. One study has found that a sentencing regime involving shorter sentences (one year) for a large offender base (all convicted persons) is more efficient than one involving longer sentences (four years) applied to a smaller offender base (repeat felons) (Petersilia and Greenwood, 1978). The crime preventive yield of both strategies was estimated to be the same, although the cost of the latter strategy would be far more substantial in terms of the size of the prison population.

5.0 The Impact of Mandatory Minimum Sentences

Mandatory sentencing laws can apply to an entire class of offences (e.g., felonies) or to just one category of crime. In Canada, MMS apply to both first and second degree murder, high treason, impaired driving and related offences, various firearms offences, betting/bookmaking, and living off the avails of child prostitution (Appendix A). Laws applying to a broad class of offenders are discussed in the next section. The research literature on firearms, impaired driving, and drug offences is examined in separate sections due to the level of attention accorded these offences in discussions of mandatory sentencing.

While murder carries a mandatory life sentence in Canada, systematic evaluations of the impact of the MMS introduced in 1976 have been conspicuously absent. Weighing the merits of MMS relative to the death penalty and other sanctions existing prior to 1976 would be a complex undertaking, given the confounding influence of the capital punishment moratorium prior to its abolition. We suggest that the case of murder be taken up elsewhere, given the extensive literature on the subject and the absence of MMS for murder in most jurisdictions – including most of those with capital punishment. While the death penalty is usually discretionary, mandatory death penalty statutes persist in a number of US states for life-term prisoners who commit murder. These statutes are designed to deter those who need an added disincentive to committing murder as they are already serving life sentences.

Many of these statutes have been repealed by state legislatures or struck down by state courts in keeping with various US Supreme Court decisions since its landmark *Furman* v. *Georgia* ruling in 1972 (Galbo, 1985). The gradual disappearance of mandatory death statutes, both before and after *Furman*, was due to "jury nullification" (i.e., juries preferred to acquit guilty defendants rather than impose the death penalty) and the failure of MMS to consider mitigating individual or offence-related factors. From the *Furman* ruling in 1972 to 1987, the US Supreme Court had struck down every mandatory death penalty statute it had ruled on and has all but explicitly deemed them unconstitutional (Bowers, 1988). Furthermore, from an international perspective, there is a world-wide trend toward the abolition of capital punishment (Radelet and Borg, 2000).

5.1 General Mandatory Sentencing Laws

Gainsborough and Mauer (2000) have pointed out that during the national decline in crime from 1991 to 1998, US states with the greatest increases in the rate of incarceration (often due to MMS) tended to experience the most modest declines in crime. States with above average increases in their incarceration rates increased their use of prison by an average of 72% and experienced a 13% decline in crime, while "below average" states increased their use of prison by 30% and saw their crime rates decline by 17%. While these findings cast doubt on the overall preventive effect of incarceration, the authors do acknowledge that, nationally, crime did decline in the 1990s with increasing incarceration rates. They did not rule out the possibility that the increased use of incarceration may have played a role in this decline, in addition to economic and other factors. Further muddying this analysis was the finding that increasing incarceration rates throughout most of the 1980s were accompanied by increases in crime.

Among the best known and most thoroughly evaluated laws prescribing MMS has been the California "Three-Strikes" law enacted in March, 1994. This law calls for a MMS of 25 years to life in prison for offenders convicted of any felony (roughly equivalent to indictable offences in Canada) following two prior convictions for serious crimes. The law also increases the prison sentence for second-strike offenders, requires consecutive prison sentences for multiple-count convictions, and limits good-time credits to 20% following the first strike. These laws have proliferated and assumed various incarnations across the US, although many are modelled on the California version. They are based on criminal career research, beginning in the 1970s, pointing to the disproportionate involvement in violence of a hardcore group of chronic offenders (e.g., Wolfgang, Figlio, and Sellin, 1972). The policy implications of these studies appeared clear: the incapacitation of these chronic offenders could occasion major reductions in crime.

Projections by researchers at Rand Corporation lent optimism to the California law (Greenwood et al., 1996). They calculated that a fully implemented Three-Strikes law would reduce serious felonies by between 22 and 34 percent. Furthermore, the Rand researchers noted that

this expected reduction was based solely on its incapacitation effect and did not consider its potential deterrent effect.

Stolzenberg and D'Alessio (1997) evaluated the impact of the law on the rates of serious (index) crimes in California's ten largest cities. While the rate of these crimes across these cities dropped by 15% from the 9-year pre-implementation period to the 20-month post-implementation period, a time-series analysis conducted by the authors suggests that this reduction was due to a declining trend in these offences already underway before the law was enacted. The authors did find a significant effect in one of the ten jurisdictions. It is also noteworthy that the drop in index crimes in the post-implementation period exceeded by a wide margin the drop in petty theft during the same period. Petty theft served as a control as it was expected to be unaffected by the legislation. While the findings appeared to provide mixed support for the Three-Strikes law, the authors speculated about its limited effect on serious crime. One explanation offered was that California's sentencing system already called for enhanced (longer) sentences for repeat offenders; therefore, many high-risk offenders were already behind bars prior to the new law's enactment. Secondly, the authors conjectured that the third strike will often occur at an age when criminal careers are on the decline, thereby limiting the law's impact.

Another short-term analysis of the impact of California's Three Strikes law indicated that major crime dropped more sharply in the state than it did nationwide (Vitiello, 1997). In the first year of the law (1994), crime in the state dropped by 4.9%, compared to 2% in the US as a whole. In the second year, California's major crime rate dropped by 7% as opposed to a 1% reduction nationwide. While these findings are noteworthy, no systematic attempt has been made to examine the role played by the law as opposed to economic and demographic factors.

Austin (1993) found that in four states with sentencing guidelines and enhancements (Pennsylvania, Florida, Minnesota, and Washington), the crime trends were similar to national trends. Wichiraya (1996) examined 31 states that have implemented some sentencing enhancements and found no significant declines in crime rates in most of these states and even increases in a few cases. Maxwell (1999) notes, however, that such studies should not be interpreted as an indication of the failure of MMS to reduce crime rates. As MMS apply to only a fraction of those entering the justice system, they are likely to only marginally affect crime rates. As of August, 1998, of the 22 states adopting Three-Strikes laws, six or less individuals had been sentenced under these laws in eight states (Schultz, 2000). Only in California have these laws been applied to a sizable group of offenders. Furthermore, 85% of those convicted under California's law were nonviolent or drug offenders, thereby limiting the laws ability to prevent violent crime.

A spate of fatalities in Western Australia, stemming from car pursuits often involving young offenders with stolen vehicles, resulted in the enactment of the *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (Broadhurst and Loh, 1993). The most controversial aspect of the Act was an 18-month mandatory prison term for those convicted four times within a period of 18 months for a violent offence or convicted seven times, with the seventh being for a serious offence. The sentence was both mandatory and indeterminate, as release following the 18-month period required approval by the Supreme Court, in the case of juveniles, and by the Governor, in the case of adults.

The authors first provided a general critique of the *Act*, arguing that it offended the principle of proportionality by relying excessively on the offender's criminal record, embraced preventive detention, and adopted the dubious strategy of selective incapacitation. Due to the poor quality of Western Australian juvenile offending records, the authors asserted that accurate estimates of the number of individuals likely to be subject to the legislation were not possible. Using South Australian data, it was predicted that between 1.3% and 3.2% of the juvenile population would be subject to the *Act* within 12 months of its implementation. South Australian cohort data indicated that there was no empirical basis to the idea that the four or seven offence threshold triggering the legislation would capture the most persistent offenders. Sixteen months following its implementation, only two offenders had been sentenced under the *Act*. The authors attributed its lack of application to the vagueness of the *Act* regarding the meaning of a prior offence and reluctance on the part of key players in the justice system to enforce it. The infrequent application of the *Act* makes it unlikely that, as enforced, it could yield a significant incapacitation effect. Also, observed declines in car thefts and chases around the introduction of the law were found to be short lived and were viewed as resulting from changes in police practices and factors other than a deterrent effect.

Morgan (2000), also in Western Australia, examined the impact of a 12-month MMS for a third home burglary offence. Enacted in November, 1996, the law was not accompanied by a significant reduction in reported home burglary offences when the pre-intervention

(1991-96) and post-intervention (1997-98) periods were compared. Although claims have been made that just a small proportion of those serving these MMS and subsequently released committed a further burglary, Morgan asserts that these claims were based on an analysis with a very small sample (57 cases) and plagued by other methodological flaws.

Chief Justice Rehnquist (1993) of the US Supreme Court has observed that MMS allocate scarce prison space to low-level criminals (e.g., the "mules" in drug trafficking) for long periods, rather than those directing criminal activity. Hence, the costs of these penalties are substantial and their benefits, in terms of crime reduction, are few.

To summarize, the evidence was mixed in terms of the effectiveness of more general mandatory sentencing laws such as "Three Strikes." Some studies show modest crime preventive effects. California's Three Strikes legislation has been the most extensively researched of these initiatives. While that state experienced a sharper decline than other states following the law's implementation, communities in California showed inconsistent effects. Also, studies comparing states with and without such a law showed no difference in their crime trends. Reasons given for the lack of a more pronounced effect of such sweeping laws include their inconsistent application, the small number of individuals to whom these laws apply, and the possibility that the most serious and persistent offenders already tend to be serving long sentences under existing legislation.

5.2 Mandatory Sentences for Firearm Offences

Over half of the mandatory sentencing provisions in Canada deal with firearms offences. These provisions were first introduced in 1977 and have been amended with the enactment of Bill C-68 in December, 1995. Section 85 of the *Criminal Code* calls for a one-year minimum penalty for using a firearm during the commission of an offence and a three-year MMS for subsequent convictions. These penalties are to be served consecutively to any other sanction imposed for the primary offence. Bill C-68 introduced ten four-year minimum sentences for serious crimes, such as manslaughter, sexual assault, robbery, and kidnapping (Appendix A).

Surveys of armed robbers conducted in Western Australia suggest that gun robbers consider the threat of punishment in general and MMS in particular (Harding, 1990). Harding found that 73% of his small sample of 15 gun robbers had actively considered the possibility of being caught. Two-thirds of the gun robbers interviewed stated that they thought about the consequences of carrying a weapon and all but one said that they knew weapon use carried a longer *maximum* penalty in Western Australia. Gun robbers were more likely to be aware of the penalties and to consider the consequences of their crimes than were robbers not using firearms, suggesting that such individuals might be most responsive to MMS. Notwithstanding this rationality, Harding found that virtually all the gun robbers said that they would carry a gun next time they committed a robbery. This study revealed an interesting divergence, seen in many contexts, between perceptions of risk and behaviour. Just as smokers may persist in their habit despite their awareness of the risks, offenders reflecting on the risks of using a gun may nevertheless continue to use firearms due to habit, the sense of security they afford, or other reasons. Thus, awareness of penal sanctions (including MMS) is no guarantee that offender behaviour will be modified by them.

The 1977 legislation imposing a one-year MMS for use of a firearm during an offence was accompanied by a decrease in the proportion of homicides and robberies in which firearms were used (Scarff, 1983). However, the Scarff evaluation study was fraught with a number of methodological shortcomings and acknowledged that there may have been a compensating increase or displacement to homicides and robberies not involving firearms (Gabor,1994b).

A study by Meredith, Steinke, and Palmer (1994) assessed the application of the one-year MMS provided for under Section 85. The study relied on data from the Canadian Police Information Centre (CPIC) regarding charges laid under Section 85 and the sentences imposed for those convicted. The authors called for caution in the interpretation of their findings due to a number of limitations of the database (e.g., missing records, under-representation of dual/hybrid and summary offences, differing reporting practices among police departments). The study revealed that approximately two-thirds of the charges laid under Section 85 were stayed, withdrawn, or dismissed. The primary offence in half the cases was robbery and the sentence imposed most frequently for convictions under Section 85 was a one-year period of incarceration. The average prison sentence imposed was 16.4 months where the Section 85 offence was imposed consecutively to the primary offence. In some cases, the firearms offence was imposed concurrently to the substantive offence. No quantitative analysis was undertaken to determine the effect of the MMS on sentence length;

however, police, Crown prosecutors, and judges interviewed in the study believed the effect was minimal or none at all. The interviews also showed that there were no written policies to guide police in laying charges under Section 85.

In the 1970s, a number of American states enacted MMS for firearms offences. Several studies examined the 1975 Massachusetts Bartley-Fox Amendment that provided for a one-year MMS for illegally carrying a firearm (Beha, 1977a; Beha, 1977b; Deutsch and Alt, 1977; Pierce and Bowers, 1990; and Rossman et al., 1980). The assessments of the Amendment were mixed. While Beha found little evidence of a preventive effect, Pierce and Bowers found that homicides, gun assaults, and armed robberies declined, but other assaults and robberies increased – a possible substitution effect. Deutsch and Alt's evaluation revealed a decline in robberies and assaults committed with firearms, while failing to show an effect for homicide. They did not explore the possibility of a displacement to similar crimes committed without guns. Many of these studies were characterized by short follow-up periods (e.g., six months). Tonry (1992) has suggested that some of Bartley-Fox's shortcomings may have been due to the greater selectivity of the police in their searches following the Amendment. In addition, the Amendment was accompanied by a major increase in the number of firearm confiscations (without arrest), as well as in case dismissals and acquittals. By undermining the certainty of punishment, these factors may have jointly lessened the effect of the law.

The Michigan Felony Firearms Statute of 1977 provided for a two-year minimum sentence for possession of a firearm during the commission of a felony to be served consecutively to the primary offence. Evaluations of this legislation revealed little evidence of a deterrent effect (Heumann and Loftin, 1979; Loftin, Heumann and McDowall, 1983). There was evidence that the statute was circumvented both by increases in case dismissals and by the tendency of the courts to undermine its intent by imposing the same overall sentence as was the case prior to its introduction.

McDowall, Loftin and Wiersema (1992) analyzed the effects of MMS for firearms offences in six American municipalities – Detroit, Jacksonville, Tampa, Miami, Philadelphia, and Pittsburgh. Aside from undertaking separate analyses in these cities, the authors pooled the results from these cities to obtain an estimate of the impact of these laws across the six jurisdictions. According to the authors, the laws had sufficient common elements to justify combining the data from the six cities. Each law required judges to impose a specific sentence for an offence involving a gun and prohibited mitigating devices, such as suspended sentences and parole. In addition, each of these laws was accompanied by a major publicity campaign. The authors compared gun and non-gun homicides, assaults, and robberies to ascertain the impact of these laws, using sophisticated time-series designs that monitored the rates of these crimes from 54 to 150 months prior to each law.

The separate analyses yielded mixed results. Gun homicides decreased in all six cities, significantly in four and insignificantly in two. Gun assaults declined in two cities and some effect was observed for armed robbery in two other cities. In the pooled analysis, a very strong effect was observed for gun homicide across the six cities, while little change was observed for non-gun homicide. There was no evidence that gun assaults were prevented by the statutes and there was some evidence that these laws may have prevented armed robberies from increasing as non-gun robberies increased following their enactment while gun robbery rates remained unchanged. Thus, the MMS seemed to have a preventive effect with regard to gun homicide and, possibly, armed robbery. The authors acknowledge that caution must be exercised in drawing conclusions from this study as the cities included were not necessarily representative of those adopting MMS for gun-related crimes. Also, no comparisons were made with cities without such laws to determine whether gun-related violence declined nationally, rather than as a result of the MMS.

An Arizona firearm sentence enhancement law enacted in 1974 was followed by highly significant reductions in gun robberies in two large counties, with no evidence of displacement to other robberies or property crimes (McPheters, Mann, and Schlagenhauf, 1984). The authors also found no significant gun robbery reduction in five other southwestern cities used as controls. They nevertheless noted that the reduction might have been due to a return of robbery rates to historical trends after they peaked in the two years prior to the law.

Marvell and Moody (1995) conducted regression analyses to assess the effects of firearm sentence enhancements on prison populations and crime across the 49 US states that have passed such laws. The study found no consistent effect on prison populations and no significant impact on gun homicide. There was also no evidence of a shift to other homicides. There was little evidence overall that other crimes were affected by these laws. In just three of the states did these laws appear to produce more imprisonment the year following implementation, along with less crime and gun use.

Such analyses are confounded by many other social and policy-related factors influencing both incarceration rates and gun use in crime. Furthermore, the firearm laws in the various states took many forms, making generalizations difficult.

To summarize, MMS for firearms offences show promise, although the findings are inconsistent or unclear. In Canada, a major evaluation of the one-year mandatory prison sentence for the commission of a crime with a firearm, introduced in 1977, indicated that a modest decrease in the proportion of homicides and robberies involving a firearm had occurred. There was some evidence, however, that there was a displacement or shift to offences committed by other weapons. This evaluation was plagued by a number of serious methodological shortcomings that preclude more definitive statements about the law's impact. Another study found that the one-year MMS has been applied inconsistently and has not increased sentence length as judges appear to provide a "going rate" for crimes. Thus, judges do not appear to regard the one-year MMS as an enhancement or add-on to the sentence imposed for the primary offence.

In several American jurisdictions, similar laws have been accompanied by reductions in gun homicides and/or robberies. The most extensively researched law was Massachusetts' Bartley-Fox Amendment, which called for a one-year mandatory prison term for carrying a gun illegally. The evidence was mixed on the impact of this Amendment on crime. It has been suggested that adaptive behaviour by the police may have undermined the law, as searches of suspects became more selective and informal remedies (e.g., the confiscation of guns without charges) became more commonplace.

An Australian study was particularly discouraging for proponents of MMS and deterrence in general, for this category of offender at least. Gun robbers in that study indicated that they would continue to use firearms in their offences despite their knowledge of mandatory terms for criminal gun use and despite their consideration of the consequences of their crimes.

5.3 Mandatory Sentences for Impaired Driving

In Canada, impaired driving infractions carry a minimum penalty of 14 days for a second conviction and 90 days for any subsequent conviction. While MMS in this area have proliferated in North America since 1980, few evaluations have assessed them directly.

There are indications that those committing this infraction may be sensitive to the certainty of punishment, as police crackdowns have been quite successful in reducing incidents of this offence (Sherman, 1990). Furthermore, research in which impaired driving scenarios were presented to subjects has shown that persons who perceived that sanctions were more certain or severe reported lower probabilities of their engaging in the behaviour (Nagin and Paternoster, 1993). At the same time, Taxman and Piquero (1998) have found that treatment-oriented sentences for impaired driving offenders may reduce recidivism rates more than punitive sentences. For first time offenders, these investigators found that less formal punishment (e.g., probation terms in which convictions are expunged if successfully completed) was the most effective in deterring impaired driving. In general, isolating the effects of punishment versus treatment is rendered difficult by the infrequency of incapacitation for impaired drivers, as well as the fact that punitive sanctions often include education and treatment measures (Yu, 1994).

Nienstedt (1990) attempted to isolate the effects of a tough law from the effects of the publicity accompanying it using a sophisticated research design. The law in question was enacted in Arizona in 1982 and called for MMS, as well as a prohibition on diversion and plea bargaining in the case of impaired driving infractions. Five months before the enactment of the law, major media campaigns were initiated in Phoenix and Tucson, Arizona's two largest cities. Aside from advertisements in both the electronic and print media, the media campaign generated a flurry of articles and programs on the subject. The impaired driving initiative was also publicized through posters, billboards, brochures, and bumper stickers. The publicity not only featured the legislation that was about to be introduced but promised increased resources for traffic enforcement. No additional resources were actually allocated. The study revealed that the reduction of accidents, including those involving alcohol, was much greater following the publicity campaign than after the enactment of the impaired driving law. Furthermore, once the effect of the publicity was statistically controlled, the law's effect on accidents vanished. An analysis of the law's implementation showed that court backlogs undermined the law's prohibition of plea bargaining, as impaired driving offences were routinely reduced to loitering. The author concluded that publicity campaigns may be a less costly and more effective alternative to largely symbolic MMS.

Grasmick, Burski Jr., and Arneklev (1993) examined the relative importance of legal sanctions and moral

prohibitions in curtailing impaired driving. They noted that moral crusades in the 1980s, spearheaded by groups such as MADD (Mothers Against Drunk Driving) and SADD (Students Against Drunk Driving), underscored the growing unacceptability of this activity. The researchers randomly sampled 332 Oklahoma City adults in 1982 and another 314 adults in 1990, probing their level of impaired driving, the shame associated with it, and their anticipated embarrassment if caught. The surveys revealed a significant decrease, from 1982 to 1990, in the number of respondents who had driven drunk in the last five years and who indicated they would do so in the future. Anticipated feelings of shame or remorse increased significantly. There was also an increase in the perceived certainty and severity of legal sanction, as well as some increase in the perceived certainty of embarrassment. While the threat of legal sanctions was found to be an important deterrent, anticipated shame was determined to be the primary deterrent.

Kenkel (1993) used data derived from the 1985 Health Interview Survey (US) to determine whether self-reported drinking and impaired driving patterns were related to state laws governing these behaviours. Nearly 12,000 males and 16,000 females participated in the survey. State laws, including MMS, were found to have a deterrent effect upon heavy drinking and impaired driving. States with tougher laws, more sobriety checks, and heavier taxes in relation to alcohol were characterized by lower levels of these behaviours.

Kingsnorth, Alvis and Gavia (1993) examined whether increases in the severity of penalties for impaired driving in Sacramento, California affected recidivism rates. Over 400 cases were examined for each of three years 1980, 1984, and 1988. In 1980, there were no written court policies in dealing with impaired driving infractions. In 1984, MMS were introduced, including a combination of fines, jail time or license restriction, probation for a first offence, and a mandatory jail sentence and other enhancements for subsequent convictions. In 1988, the fines, financial penalties and other provisions became more severe than in 1984. The authors found that recidivism rates over the ten-year study period (1980-90) did not decline with the increasing severity of penalties.

Yu (1994) examined the files of almost fourteen thousand New York State drivers with an impaired driving conviction record in order to identify the sanctions most likely to exercise a deterrent effect. The author found that increases in fines reduced recidivism significantly. Yu found that license withdrawals, which were mandatory but could vary in length, did not show an effect on recidivism. He conjectured that license actions imposed fewer consequences on impaired drivers, as these measures would not necessarily prevent them from driving. Yu further found that the celerity or swiftness of punishment was not an important factor, as the intervals between arrest and conviction tended to be long. Also, he speculated that impaired driving was a unique offence in that repeat offenders, by virtue of their substance abuse, did not respond to swift punishment.

Grube and Kearney (1983) evaluated the impact of a two-day mandatory jail sentence, enacted in 1979 in Yakima County (Washington) for anyone convicted of impaired driving. They found that alcohol involvement in fatal accidents occurring in the county did not change significantly following the introduction of the MMS; nor was such involvement lower in the county than in the state as a whole. One reason cited for the apparent failure of the law to reduce the role of alcohol in fatal accidents was the finding that 40% of residents were unaware of the mandatory penalty.

Ross and Voas (1990) assessed the effects of sentence severity on impaired driving in the neighbouring cities of New Philadelphia and Cambridge, Ohio in May, 1985. The cities were similar economically and demographically. In Cambridge, impaired drivers were dealt with more traditionally – their jail sentences rarely exceeded the state minimum of three days and their sentences were usually served in education-oriented weekend camps rather than in the county jail. By contrast, in New Philadelphia, the sole judge imposed a "standard" jail term of 15 days, a $750 fine, and a six-month license restriction on first offenders. Surveys conducted in the two cities indicated that New Philadelphia residents did perceive the certainty and severity of penalties to be greater than in Cambridge. Despite the differences in both actual and expected punishments, no significant differences were found in the levels of impaired driving in the two cities as indicated by random breath tests. A study of court files indicated that the re-conviction rate, too, was similar in both cities and therefore unaffected by the harsher penalties in New Philadelphia. The authors concluded that increasing sentence severity did not serve as a deterrent without a concomitant increase in the certainty of punishment.

To summarize, the deterrent effects of MMS for impaired driving are especially difficult to assess as these legislative initiatives are usually accompanied by educational campaigns. In addition, legal sanctions are often accompanied by treatment for alcohol abuse. Research attempting to isolate the effects of legal sanctions has found that people are more likely to

respond to the shame associated with impaired driving than to the threat of punishment *per se*, although the level of shame is undoubtedly influenced by sanctions and publicity campaigns. Overall, the evidence in this area holds out more hope for vigorous law enforcement and the certainty of punishment than for tough sentences. Studies indicate that MMS and sanctions of increasing severity do not reduce recidivism rates or alcohol-related accidents. One author has noted that impaired driving often involves substance abuse which, in turn, cannot be adequately dealt with through punishments alone.

5.4 Mandatory Sentences for Drug Offences

The most extreme manifestation of MMS for drug offences can be seen in Malaysia. In 1975, the Malaysian Parliament imposed a mandatory life sentence for drug trafficking and, in 1983, a mandatory death penalty was introduced for this crime (Harring, 1991). Over 200 death sentences were imposed between 1985 and 1989. However, the conviction rate has declined by 30% during those years and many charges are being dropped by the police and Public Prosecutor. In many cases, charges are being used as leverage to gain the cooperation of defendants. Also, in 1989, appellate judges began to reduce death sentences to life. The judiciary has developed a number of legal devices to spare defendants from the death sentence, including their conviction for drug possession rather than trafficking. The author asserts that the Malaysian experience demonstrates the limitations of a "drug war" model in dealing with the drug problem. Despite over 100 executions and many more death sentences imposed, as well as more aggressive tactics by police, drug use and trafficking remain serious social problems. This case provides another illustration of adaptive behaviour on the part of actors within the justice system in circumventing a law regarded as excessively harsh, inflexible, and overly cumbersome to enforce.

In the United States, the *Anti-Drug Abuse Acts* of 1986 and 1988 prescribed harsh minimum penalties at the federal level (Spencer, 1995). In 1986, a 5 to 40-year sentence, without probation or parole, was mandated for first offenders convicted of possession with intent to distribute small quantities of designated substances. The sentence was 10 years to life for larger quantities. The 1988 Amendments increased MMS, imposed these sentences for even smaller quantities, and prescribed especially tough sentences for first-time offenders possessing crack and other cocaine-based substances. Congressional debates revealed a view of drug offenders as essentially non-human and as not responding to deterrents. As a consequence, the focus of legislation turned to long-term incapacitation. Surveys in the 1990s indicate that illicit drug use remains at a high level in the US – there are about 12.5 million cocaine, hallucinogen, and heroin users annually – and many crimes continue to be drug-related. At the same time, Spencer notes that convictions and the length of sentences have increased sharply for drug offenders between 1980 and 1990, while the average length of sentences for other crimes has decreased. In 1990, the majority of federal prisoners serving MMS were first-time offenders. Furthermore, many were low-level, non-violent individuals. From a utilitarian perspective, the federal system appears to be incarcerating the wrong people; individuals who are easily replaced in the illicit market. Spencer argues that low-level drug offenders may not even consider imprisonment as punitive, due to the privations they experience in the community.

Some of the most sophisticated research in this area has been undertaken at the Rand Corporation (Caulkins et al., 1997). Through various mathematical models, Rand researchers compared the cost effectiveness of various drug prevention/control strategies, including lengthy MMS. Their analyses considered the cost of each strategy and the expected yield in terms of both drug consumption and crime reductions. Their conclusion was that conventional sentences imposed on dealers are more cost effective than long MMS reserved for fewer offenders and that treating heavy users is more cost effective than either approach in lowering drug use or drug-related crime. MMS were found to be the most cost effective strategy only in the case of the highest-level dealers; however, the low thresholds at which MMS tend to kick in means that these laws are more likely to ensnare low-level offenders. Also, high-level dealers are more likely to avoid MMS, as they are in a better position to have information to trade for an exemption from these penalties. Finally, these investigators note that the time horizon of evaluations is critical, as MMS become less cost effective over time.

Hansen (1999) asserts that the tide is turning against MMS for drug infractions. He notes that they have done little to reduce crime or to put large-scale dealers out of business. Rather, they have filled prisons with young, low-level, non-violent individuals at great cost to taxpayers. Hansen points out that, in Massachusetts, 84% of inmates serving mandatory drug sentences are first-time offenders.

Two Milwaukee field studies, involving interviews with street gang leaders and members, shed some light on the potential impact of severe and mandatory penalties for

drug offences (Hagedorn, 1994). These studies reveal that gangs involved in dealing drugs are anything but a monolith. In fact, most gang members are involved intermittently in this activity, financial rewards tend to be modest (one-third earned about the minimum wage), and most of these dealers would opt for a conventional *lifestyle and work, if that option was available*. Others sell to support their habits and just a fraction of gang members are committed to selling drugs as a career. MMS fail to discriminate between these hardcore drug dealers and those who feel compelled to sell due to an addiction or difficulties encountered in participating steadily in the work force. The implication is that employment opportunities, more accessible drug treatment, and alternative sentences would be preferable to the "iron fist of the war on drugs."

Harsh MMS and the "drug war" approach in general show little effect in relation to drug offences. Judges routinely circumvent the "mandatory" death sentences for drug trafficking in Malaysia and the tough MMS in the US have imprisoned mostly low-level, nonviolent offenders. MMS do not appear to influence drug consumption or drug-related crime in any measurable way. A variety of research methods concludes that treatment-based approaches are more cost effective than lengthy prison terms. MMS are blunt instruments that fail to distinguish between low and high-level, as well as hardcore versus transient drug dealers. Optimally, it would appear that tough sentences should be reserved for hardcore, high-level dealers, while treatment may be more appropriate for addicted dealers and employment opportunities may be more cost effective in relation to part-time dealers who are underemployed.

5.5 Estimating the Effects of Hypothetical Mandatory Sentences

Brown (1998) assessed the potential impact of MMS through an analysis of the characteristics of a national sample of 613 offenders released from New Zealand prisons during 1986. These offenders had been either released halfway through their sentences on parole or at two-thirds of sentence on remission. A subsequent two and one-half year follow-up suggested that the marginal incapacitation effects of additional confinement during the post-release period would have been modest. Just five percent of the sample were convicted for a serious offence during the follow-up period. Furthermore, three-quarters of these individuals had been imprisoned for non-violent offences – offences that would not have predicted the serious offences of those who did recidivate nor have warranted additional confinement.

In Franklin County, Ohio, investigators studied the criminal records of 342 individuals arrested for violent felonies in 1973 to determine whether that offence could *have been prevented* by a five-year MMS for a previous juvenile or adult felony conviction (Van Dine, Dinitz, and Conrad, 1979). Over half of these offenders were found to have no previous felony conviction. According to the authors' calculations, a five-year MMS imposed for violent felonies in the five years leading up to 1973 would have reduced the 1973 felony rate in the county by just 1% to 4%. A re-calculation of the figures, using more generous assumptions, yielded a 15% reduction in the felony rate (Boland, 1978). The Ohio study underscored the notion that, each year, many new offenders come to the attention of the justice system. In Michigan, Johnson (1978) further found that only about 24% of those arrested for violent offences had a previous violent felony conviction. Harsh incapacitation policies would be most effective where most crime was confined to a relatively small and specialized (e.g., exclusively violent) offender group.

In a Swedish study of all persons born in 1953 and living in the Stockholm area in 1963, Andersson (1993) estimated the crime preventive effect that would be achieved if a two-year MMS was imposed for *any* second criminal offence. He concluded that 28% of all sentences for crimes would be prevented, while the prison population would increase by 500%. Such a policy would bring Sweden near the top of the list of nations in terms of its per capita prison population (Mathiesen, 1998). Furthermore, Mathiesen contends that the preventive effect would be far more modest as Andersson's calculation fails to account for undetected offenders, the substitution of prevented crimes by others, the adverse effects of incarceration on post-release behaviour, and the entry into crime by new cohorts of offenders.

One major concern with MMS based exclusively on the commission of a set number of designated offences (i.e., collective incapacitation) is that they are applied to individuals across the entire risk spectrum. Hence, false positives, the false assumption that those receiving such penalties will repeat their crimes if not incarcerated, tend to be problematic. Even if we accept Andersson's very liberal estimates of crime preventive gains from blanket MMS for all second offenders, a 28% reduction in known crimes would require a five-fold increase of Sweden's prison population – an increase from 5,200 to 26,000 inmates. Many low risk offenders would be

ensnared in the web of such sweeping legislation, exacting a massive economic and human toll.

The inefficiency and costs seemingly associated with collective incapacitation strategies have led investigators to project the preventive effects of sentencing strategies that would consider individual risk factors. A subsequent study by Andersson revealed that if a MMS was also imposed on the basis of criminal history and prior drug use/offence data, 44.5% of those predicted to be poor risks would actually be false positives. Such *selective incapacitation* strategies try to refine incapacitation policies and make them economically more feasible.

One of the best known efforts to develop an effective and parsimonious incapacitation strategy was that of Greenwood and Abrahamse (1982) at the Rand Corporation. Using a self-report study on a large inmate sample, the authors classified the inmates into high, medium, and low-rate offenders. They then developed a prediction instrument to identify high-rate offenders. Predictors included age of onset of criminality, substance abuse, and employment history. Their hypothetical scheme involved the incarceration of just the high-rate offenders. The propriety of predictors such as employment history has been questioned (Beres and Griffith, 1998). This issue aside, the authors estimated that the implementation of their prediction scheme could reduce the California robbery rate by 15%, while simultaneously reducing the number of incarcerated robbers by 5%. Their scheme correctly classified offenders as low, medium or high rate just 51% of the time, meaning that prediction errors occurred in 49% of the cases. Reanalyses of their data place the false positive rate (i.e., the rate at which individuals are erroneously predicted to be high-rate offenders) at over 50% (Visher, 1986). Auerhahn (1999) replicated the Rand study using a more current sample of 2,188 California state prison inmates. Using a very similar prediction instrument, her studied improved predictive accuracy to just 60%. Even so, just slightly over a third of those predicted to be high-rate offenders were correctly classified – i.e., were actually found to be high-rate offenders.

Another predictive instrument developed by the Institute of Law and Social Research in Washington identified 200 "chronic offenders" from a sample of 1,708 federal parolees in the US (cited in Mathiesen, 1998). Eighty-five percent of those predicted to be chronic offenders recidivated during a five-year follow up, while 35% of those predicted to be non-chronic offenders recidivated. The results therefore improved over the Rand study in terms of false positives, but revealed a problematic number of false negatives (i.e., those predicted to be low-rate offenders who recidivated).

Estimates of the potential crime preventive effects, through incapacitation, of several hypothetical mandatory sentencing policies triggered by a violent crime indicate that the benefits would be modest relative to the substantial prison costs. This is due to low reconviction rates on further violent offences during the time these penalties would be in effect. Blanket or collective incapacitation strategies would needlessly incarcerate many individuals not at risk of reconviction. Selective incapacitation strategies aimed at high-rate offenders would be more efficient; however, they are plagued by prediction errors.

6.0 Mandatory Penalties and Sentencing Disparities

6.1 General Disparities and the Shift from Judicial to Prosecutorial Discretion

One rationale for MMS is that excessive judicial discretion in sentencing results in unacceptable disparities. Scholars dealing with the issue of disparity have distinguished between that which is warranted and unwarranted. The "unwarranted" form refers to disparities in sentencing that are not accounted for by offender or offence characterisitics. Tonry (1996) has shown that such disparities are an international problem. Roberts (1999:156) has demonstrated that there is "substantial cross-jurisdictional variation" in sentencing in Canada. Furthermore, Palys and Divorski (1986) have documented the presence of unwarranted sentencing disparities through the presentation of a number of scenarios to judges from across Canada. David Daubney, a former MP who headed the House of Commons Committee on Sentencing and Parole in 1988, stated, "Clearly, the kind of disparity we're seeing is unacceptable and doesn't do anything for the public image of the criminal justice system" (quoted in Roberts, 1999:156). Proponents of MMS assert that these penalties can minimize such disparities.

Experience with MMS in the US, however, has shown that reducing judicial discretion may merely shift it to police and prosecutors. The police have the power to arrest an individual or let him/her go with a warning. Prosecutors have the power to proceed, dismiss, or stay a charge. Wallace (1993:13) has argued that by removing discretion from the sentencing process, MMS have "succeeded only in shifting it ... from the judge, in public proceedings conducted on the record in the courtroom, to the prosecutor's office, off the record and behind closed doors." The lack of openness and accountability of charging and plea negotiation processes may undermine the integrity of the entire sentencing process. Judges, according to Wallace, have been so limited in their discretion that they have been compelled, at times, to impose wildly disproportionate sentences.

One example of such a sentence is provided by a case in the UK in which a secondary participant in a robbery received a mandatory life sentence under the Crime (Sentences) Act of 1997, as a result of a previous conviction, while the primary participants (lacking a prior record) were given five-year prison terms (Davies, 2000). Furthermore, considerable disparities have been introduced in the US federal system by conferring upon prosecutors the power to unilaterally reward a defendant's cooperation. The defendant's "substantial assistance" in prosecuting somebody else is the only statutory basis for a judge to sentence below a MMS. US Attorneys can define "substantial" as they wish and the beneficiaries of this discount tend to be high-level, rather than small-scale, offenders.

One US federal prosecutor has argued that the reduction of judicial discretion brought about by MMS occurred as a result of grossly inadequate sentences imposed by judges on serious offenders (Baylson, 1993). Such inadequate and disproportionate sentences and the resulting mistrust of the judiciary prompted legislators to enact MMS to ensure the incapacitation of the violent. Baylson adds that exemptions from MMS accorded offenders who provide "substantial assistance" in the prosecution of others allows for the capture, prosecution, and sentencing of co-conspirators who would otherwise evade detection. This lever available to the prosecution yields a net benefit as more high-level offenders are neutralized. Finally, Baylson notes that MMS do not increase prosecutorial discretion - the discretion relating to seeking indictments for multiple levels of crime has always existed - but merely adds teeth to prosecutorial decisions.

Harris and Jesilow (2000) examined the implementation of the 1994 "Three Strikes" legislation in six California counties. Interviews were conducted with a total of 96 prosecutors, defence attorneys, judges, high-ranking court administrators, and support personnel. In addition, 226 questionnaires sent to judges, district attorneys, and public defenders across the six counties were analyzed. The study revealed that judges routinely offered second-strike defendants the lowest possible sentence in return for a guilty plea and the district attorney partially nullified the law in one county as he would file Three Strikes cases only when the current offence was serious or violent. The study also showed the critical role played by prosecutors in determining the presence of past "strike" convictions in a case. Prosecutors ignore or count the past conviction, depending on whether they believe the case deserves leniency. Approximately 70% of the judges and 90% of the public defenders surveyed believed that prosecutors

counted prior convictions as "strikes" too frequently. These actors presumably viewed the outcome in such cases as disproportionate relative to the attributes of the defendant. Overall, the Three Strikes law increased tension between courtroom actors, placed tremendous stress upon public defenders as a result of massive increases in trials, and led to efforts by judges to regain control over sentencing by dismissing prior strikes in accordance with the *Romero* decision in California. The net effect was that the predictability of case outcomes, a principal rationale of MMS, was undermined.

The United States Sentencing Commission (1991) issued a special report to Congress on the application of minimum penalties. Using sentencing data covering the period 1984-1990, the Commission found that a MMS was not imposed in 41% of the cases in which a charge carrying a minimum penalty was warranted by offence and offender characteristics. In addition, the Commission found that disparity was occurring in two ways. First, similar defendants were being charged and convicted differently. These differences seemed to be based on factors such as race, circuit, and prosecution practices. Secondly, very different defendants, in terms of the nature of the offence and their role in it, were receiving similar reductions below the mandatory minimum provision.

Oliss (1995) expands upon the last-mentioned issue by referring to drug-related provisions. He notes that excessive uniformity in sentencing reduces disparity only in regard to the one factor upon which the system focuses - drug quantity. Attention to only one factor, he adds, creates a misplaced equality that undermines the goals of imposing consistent sentences for similar crimes. He contends that new disparities emerge when judges are prevented from considering the offender's prior record, role in a conspiracy, or culpability. Sager (1999) has further pointed out that the quantity of drugs for which one is charged is also subject to prosecutorial discretion, as police can lay separate charges for each drug transaction or wait until a dealer completes several sales and charge for the total amount of drugs involved. A third source of disparity with regard to MMS based on drug quantity is the large increase in sentences associated with miniscule increases in quantity (US Sentencing Commission, 1991). One-tenth of a gram of cocaine (from 5.0 to 5.1 grams) can elevate a prison sentence by four or more years under federal provisions in the US.

Lacasse and Payne (1999) assessed the impact of the federal sentencing reforms in the US by examining plea negotiation and sentences in two New York State federal district courts. The authors found that when all offences were considered, guilty pleas actually increased from the pre-reform period (1981-1987) to the post-reform period (1988-1995). The guilty plea rate was the same or lower for offences carrying MMS. As expected, sentence lengths increased in the post-reform era. The increase in sentence length when MMS are imposed paradoxically creates a greater disparity between those cases in which a defendant pleads guilty and those in which a conviction is achieved at trial. Lacasse and Payne found that the discount for a guilty plea was greater after the sentencing reforms as plea sentences, on average, were just 15% of the trial sentences. Surprisingly, variation in sentences actually increased in the post-reform period and were substantial across the two districts. Furthermore, the variation in sentences attributable to the judge increased rather than decreased following the reforms. Thus, this study found that the sentencing guidelines and MMS did not succeed in removing the judge as an influence on sentences.

6.2 Racial Disparity

There is a concern that MMS may be imposed disproportionately upon members of minority groups. Provine (1998) notes that the federal sentencing guidelines, established in the US in 1984 to promote equity and transparency in sentencing, have ironically increased racial disparities. Much of this increasing disparity has been attributed to MMS introduced in the 1980s for selected drug offences. Between 1976 and 1989, white drug arrests grew by 70%, while black drug arrests grew by 450% (Tonry, 1996). Free (1997) has pointed out that African Americans, who in 1990 constituted 28.2% of all federal (US) defendants in the US, accounted for 38.5% of all federal defendants convicted under mandatory minimum provisions. African Americans in the federal system were also more likely to be sentenced at or above the MMS than were white or Hispanic defendants. Maxwell (1999) corroborates the idea of a differential impact of MMS, showing that the number of African Americans, both male and female, sentenced to state or federal prisons between 1985 and 1995 has grown at a faster rate than the number of white Americans of both sexes. Furthermore, Austin (1993) found that the Florida habitual offender law was applied twice as often to black as opposed to white offenders. In California, African Americans constitute only 7% of the state's population and 20% of those arrested for felonies, but they constitute 43% of those sentenced under the Three Strikes law (Schultz, 2000).

Free argues that much of the disproportionate impact of MMS on African Americans has been due to the harsh

sentences attached to crack cocaine offences. While crack cocaine consumption is more likely to produce dependence and result in criminality associated with dependence than cocaine hydrochloride, the physiological and psychoactive effects of the two are similar (Hatsukami and Fischman, 1996). The properties of crack do not appear to warrant the substantial difference in the MMS imposed for the two forms of cocaine. Since law enforcement efforts dealing with the traffic in crack are concentrated in lower income and minority neighbourhoods, African Americans are more likely to be prosecuted for these offences. Duster (1995) indicates that it has become an increasingly common practice for police to intercept citizens who fit the profile of an offender and that such profiles have assumed a racial dimension. Also, Provine notes that drug markets operated by blacks tend to be more open and vulnerable to police action than the more clandestine markets run by whites from private premises. Furthermore, Provine asserts that the disproportionate incarceration of black Americans is not due to higher consumption levels as national survey data indicate that 76 percent of illicit drug users in the US are white.

Free adds that racial bias in prosecutorial decision-making becomes a greater concern, as MMS shift greater power to the prosecutorial level. Moreover, MMS are often tied to the defendant's criminal record and African Americans are more likely than their white counterparts to have prior convictions. While criminal records themselves may reflect previous racial biases in law enforcement, they elevate the likelihood that MMS will be imposed on black defendants.

In Western Australia, evidence from the Children's Court indicates that aboriginal offenders are seriously over-represented in three-strikes cases (Morgan, 2000). Such over-representation is thought to be due to both the nature of offences eligible for MMS – those often committed by aboriginal people are more likely to be targeted – and to the more aggressive charging practices used in cases involving aboriginal offenders. In Canada, MMS for various firearms and impaired driving offences are triggered or enhanced for a second conviction. To the extent that aboriginal defendants may be more likely to have a criminal record in some of these areas (Hartnagel, 2000), they will be more susceptible to the imposition of MMS.

Aside from creating disparities in sentence length, MMS may have a different impact upon certain minority groups. Perera (2000) argues that MMS for property crimes in Australia, involving the perpetrator's removal to a remote institution, are particularly traumatic for aboriginal people who have experienced a long history of dislocation and dispersal.

6.3 Effects of Mandatory Sentences on Other Groups

The *Crime Sentences Act* of 1997 in the United Kingdom established MMS for a second serious violent or sexual offence, for a third drug trafficking or residential burglary offence, and for repeat offenders (Laing, 1997). The *Act* contains a safety valve, allowing the court to override the MMS in exceptional circumstances. In the case of an offender with a mental disorder, the *Act* authorizes the court, in its discretion, to direct an offender who has received a prison sentence to be admitted instead to a hospital for treatment. Objections to imposing MMS on these offenders include the notion that long custodial sentences for such offenders are inappropriate and the fear that these penalties will create an increase in insanity and related defences. A further concern is that therapeutic interventions for mentally disordered offenders will be thwarted.

The concern has been expressed that women may be affected disproportionately by MMS (Canadian Association of Elizabeth Fry Societies, 2001; Casey and Wiatrowski, 1996). It is argued that imprisonment places additional burdens on women, due to their familial responsibilities, the inadequate programs available in prisons for women, and the greater distances of women's institutions from their homes. These concerns are especially germane to the situation of Canadian women who are serving federal terms in predominantly male institutions. The equalizing tendency of MMS is said to create gender disparities as sentences of equal length for men and women are thought to weigh more heavily on the latter. Also, Raeder (1993) points out that women in abusive relationships may be coerced into participating in crimes and, therefore, such mitigating circumstances ought to be taken into account.

MMS do not necessarily stand to reduce disparities in sentencing. Judicial discretion is, to some extent, replaced by prosecutorial discretion, producing a loss of transparency in decision-making. In California, under the Three Strikes law, prosecutors and even judges ignore previous convictions where they feel the defendant deserves leniency. MMS do not appear to promote equity in sentencing as they seem to be applied disproportionately to low-level offenders and those from minority groups. One reason is that high-level offenders (e.g., drug kingpins) have more information to trade in return for more lenient treatment. Women and

aboriginal peoples may suffer disproportionately from the privations associated with MMS.

Furthermore, it has been argued that the imposition of uniformity in sentencing may create other disparities as different offenders are treated similarly. The offender's degree of culpability and role in the offence are ignored when sentencing is based exclusively on the nature of the infraction.

7.0 The Economic Impact of Mandatory Sentences

7.1 Court Costs

Assessments of California's "Three Strikes" law indicate that the number of trials increase dramatically as defendant's have little incentive to plead guilty on charges for eligible offences (Harris and Jesilow, 2000). A bipartisan committee established by the US Congress to study the federal courts estimated that even a five percent reduction in guilty pleas would result in a 33 to 50 percent increase in trials (Federal Courts Study Committee, 1990; cited in Wallace, 1993).

Carlson and Nidey (1995) studied the impact of a two-day minimum jail sentence (along with mandatory participation in an education program) on the processing of domestic assault cases in an Iowa county. They examined half of all the serious and aggravated misdemeanor domestic abuse assault cases filed in the county for one year immediately preceding and two years immediately following the implementation of the measures (June 1992). The investigators also conducted formal interviews with four defense attorneys and one district court judge. They found that the length of time taken to adjudicate cases increased and that cases became substantially more complex and time consuming in the year immediately following the new measures. The interviews indicated that the MMS reduced the incentive for defendants to plead guilty, resulting in increased workloads. Public defenders and prosecutors had to prepare for more trials and subpoena more witnesses, court staff had to manage the increase in trial time, and judges had to hear more cases. This relatively mild minimum penalty therefore added substantially to the cost of processing cases.

Cushman (1996) reported on the expected increase in demand on the resources of three California counties produced by the "Three Strikes" law. These projections were based on an exercise involving judges, prosecutors, public defenders, probation officers, and law enforcement officials in which 73 cases adjudicated prior to the law were re-examined to ascertain how they might be adjudicated under the "Three Strikes" law. This exercise revealed that the expected increase in jury trials in Los Angeles, Santa Clara, and San Diego Counties was 144%, 193%, and 300%, respectively. In Los Angeles, in absolute terms, this would mean an additional 3,400 jury trials in one year. Furthermore, while 94% of California felony cases were disposed of through plea bargaining prior to the law, just 6% of Three Strikes cases were resolved in that manner following its implementation. Increasing jury trials means more jurors, hearings, longer preliminary hearings, increasing defence costs, more court security, and a larger pre-trial jail population (Cushman, 1996). Civil litigation, too, may be affected by an increase in jury trials, as delays for civil litigants increase. The greater use of incarceration brought about by Three Strikes and related laws might have the benefit of lower probation caseloads, although this saving would not offset the additional court and prison costs.

The costs of implementing MMS may be offset, to some degree at least, by their crime preventive effects (Austin, 1996), although evidence from California suggests that the state's Three Strikes law has not produced savings with regard to insurance premiums, security expenses, or victim services (Schultz, 2000). Some jurisdictions report that the pressure on prosecutorial resources and on local jails is such that many misdemeanour cases are being dismissed (Cushman, 1996). Thus, a major side effect of severe MMS is a weakening of the justice system's ability to deal with offences not covered by the law in question.

7.2 Effects on Prison Populations

A study using data from the six most populous US states found that rising prison populations from 1977-88 were strongly influenced by explicit changes in imprisonment policies, including the introduction of MMS in these states (Cohen and Canela-Cacho, 1994). The authors found that both increases in the expected certainty and length of incarceration during the period played a role in increasing prison populations.

Wooldredge (1996) examined the relationship between state-level sentencing policies and inmate crowding for 1991. He found that states with larger populations were more likely to have longer minimum prison sentences and more mandatory prison terms for felony convictions. These MMS, in turn, result in more long term prison inmates. As this population ages, more medical and other resources will be required to accommodate this situation (Chaneles, 1987). The unintended consequences of MMS, especially those that are longer in duration, will become more obvious and

likely more dire as time goes on and more long-term offenders are placed in the system.

Bales and Dees (1992) note that the creation of a large sub-population of long-term offenders as a result of MMS may produce management problems for institutions. This may especially be the case where MMS preclude the acquisition of "good-time" credits by inmates, thereby leaving little incentive for them to conform to institutional rules. The authors further assert that, in jurisdictions such as Florida, MMS may have the unintended effects of accelerating the early release of other inmates, due to court-ordered ceilings on prison populations. The greater the number of long-term inmates serving MMS, the shorter the sentences of other inmates need to be in order to keep the prison population under the ceiling. In Los Angeles County jail, for example, inmates currently serve just 45% of their sentence to make room for defendants awaiting trial (Markel, 1996). Shortening the sentences or accelerating releases of offenders not subject to MMS may, in turn, increase public disapproval, the rationale for introducing MMS in the first place.

California's "Three Strikes" law has been projected to require an additional 20 prisons in the short-term and to cost upwards of $5 billion (Owens, 1995). Each sentence of 25 years to life will cost the taxpayer at least half a million dollars (Markel, 1996). The costs of such laws accrue over time as the additional time served under Three Strikes and similar legislation may take effect years after the passing of sentence (Schultz, 2000). A Texas recidivist statute, even more all-encompassing than California's in its inclusion of minor property offences as "strikes", helped increase the state's prison building budget from $64.7 million in 1974 to $3.7 billion in 1994. In addition, the cost of operating the state's prisons rose six-fold from 1982 to 1992. MMS introduced in Oregon to be imposed for 16 felonies is expected to require 6,085 additional prison beds in the next five years at a cost of $461 million for construction and more than $100 million per year for operation (Bogan and Factor, 1995).

Vitiello (1997) argues that legislatures in states with Three Strikes laws will be forced to allocate resources away from prevention programs and law enforcement to pay for prison construction and maintenance. Fewer street officers will mean a lower certainty of punishment. The long-term result, he conjectures, is that resources will be expended increasingly to incarcerate an older and less dangerous prison population, while younger offenders will face a lower chance of being caught. These more active offenders will thus be on the street longer before they are incapacitated.

MMS calling for long prison terms will carry prohibitive costs due to sizable increases in jury trials and prison populations. These costs may weaken the justice system's response to crimes and offenders not subject to MMS, as resources are shifted from these other areas. Lengthy MMS will yield an increasingly older prison population, creating a perverse effect whereby prisons will house more "costly" but, at the same time, less dangerous inmates.

8.0 Other Issues

The US Sentencing Commission (1991) favoured sentencing guidelines over MMS for a number of reasons. To begin with, the guidelines incorporated the MMS as the base-level sentences in their sentencing ranges. The Commission viewed sentencing guidelines as more precise in giving consideration to offence and offender characteristics. While allowing judges to depart from guideline ranges, these departures were rare and certainty of punishment was quite high. On the other hand, the extent of prosecutorial discretion in the case of MMS and the failure to prove all the elements at trial undermine the certainty of punishment and, hence, their potential deterrent effect. The Commission considered MMS a highly blunt instrument, providing low-level drug mules the same sentences as kingpins. As far as inducing the cooperation of defendants with the authorities, the Commission felt that the guidelines achieved this goal just as effectively as the provision for substantial assistance motions in the case of MMS. The guidelines provide for a two-level reduction in the sentence calculation for an offender's "acceptance of responsibility".

There have been many illustrations of seriously disproportionate sentences under mandatory sentencing laws. A 25-years to life sentence for a shoplifter taking food valued at a few dollars, an individual stealing a slice of pizza on the beach, and a 50-year-old man, with a record of two bicycle thefts as a juvenile, trying to pass a bad check (a hypothetical scenario) illustrate the actual and potential side effects of California's "Three Strikes" law (Owens, 1995). The disproportionate sentences sometimes meted out under mandatory minimum statutes resulted in the enactment of the *Violent Crime Control and Law Enforcement Act* in 1994 which, among other things, exempted low-level, first-time, nonviolent drug offenders from MMS. The provision instructs courts to follow the sentencing guidelines for this class of offenders, thereby tacitly acknowledging the limitations and excesses of MMS (Oliss, 1995).

Such safety valves are inevitable consequences of very tough legislation. In California, the "Three Strikes" law allows prosecutors to dismiss offenders' prior convictions if they believe the law mandates a seriously disproportionate sentence (Benekos and Merlo, 1995). The hydraulic nature of the justice system (i.e., discretion cannot be removed, only transferred) is also illustrated by the ability of prosecutors to classify borderline offences as misdemeanours rather than felonies, thereby circumventing MMS for repeated felonies. Some prosecutors in California have also reported that victims have occasionally let it be known that they would not testify if a conviction meant the defendant would be subject to the "Three Strikes" law. Jury nullification may also be a side effect of MMS. It may take the form of the refusal to convict due to the view that a penalty is excessive (Harris and Jesilow, 2000). The *Romero* ruling by California's Supreme Court has added another safety valve by enabling judges to discount previous convictions if justice is thereby served.

Mandatory sentencing laws, such as Canada's minimum terms for murder and California's "Three Strikes" initiative, have also been criticized on the grounds that the discretion of correctional officials to reward good behaviour is severely limited or removed (Owens, 1995). The control of prisoners subject to such sentences is thereby more difficult, producing a potentially more volatile correctional population. Similar side effects include instances in which suspects have resisted arrest and even shot at police officers believing that, if apprehended, they would be prosecuted under a "Three Strikes" law (Benekos and Merlo, 1995). These observations illustrate another hydraulic feature of such laws; the displacement of some violence from the street to the criminal justice system. It has been further argued that the increasing desperation of defendants will lead to more suicides and killings of witnesses, as the harsh sentences leave little room for additional consequences for such actions (Markel, 1996).

The rigidity of MMS results in some grossly disproportionate sentences. The prospects of such disproportionate sentences inevitably lead to compensating behaviours that contravene the sentencing regime. Severe MMS may increase the danger to which police, correctional personnel, and victims/witnesses are exposed as offenders may display more desperation in their attempts to avoid capture or conviction and they may have fewer incentives to behave cooperatively while in custody.

The US Sentencing Commission favours sentencing guidelines to MMS, as sentences are more likely to be proportional to the offence and to take offender characteristics and into account. Sentencing guidelines are also likely to be administered more consistently as they are less likely to be undermined by justice system actors.

9.0 Conclusions

From an international perspective, MMS range from fines and license restrictions for impaired driving to life terms and even the death penalty for murder and drug trafficking. Such a wide range of sanctions and triggering offences precludes sweeping generalizations about the impact of MMS. Hence, conclusions about the utility of MMS ought to be qualified, tailored to specific crime categories and sanctions. The severity and inflexibility of some mandatory sentencing policies is such as to place a special onus on proponents to demonstrate that their economic and human costs, as well as their incursion upon the judicial role in sentencing, is warranted by their preventive and other benefits.

This review focused on the utilitarian, as opposed to the retributive or denunciatory aims of MMS. To that end, the manner in which MMS have been implemented was examined to determine whether, in fact, these penalties do increase the certainty and/or severity of penal sanctions. A hydraulic view of the justice system suggests that the removal of discretion at one level (e.g., the judicial) may merely shift it to the prosecutorial level. Crime reduction can be expected only if MMS are applied consistently. Even then, there is no guarantee that they will increase the severity of sanctions, as previous sanctions may have exceeded the statutory minimum introduced. Similarly, MMS may fail to increase the certainty of punishment if prosecutors circumvent them by reducing or dismissing charges and juries are more reluctant to convict defendants they feel would face excessive punishment.

Where MMS are properly applied, their *marginal* or added benefits over alternative sanctions must be demonstrated. Thus, will a MMS that increases the average prison term for an offence from seven to nine years deter more people from committing that offence or prevent additional crimes through incapacitation? Incapacitation does not always prevent crime (where offenders commit crimes in groups or are replaced in the illicit marketplace) and is thought to provide diminishing returns as offenders age.

9.1 Deterrence and Incapacitation

Practically speaking, more lengthy MMS must be shown to have deterrent as well as incapacitative effects in order to justify substantial increases in prison populations. The potential crime preventive effects of legal sanctions vary in relation to the target population. The evidence on deterrence suggests that the potential offender population comprises at least two broad groups. Society at large, including more casual offenders, is seen as showing some rationality in the decision to commit crimes and the form such crimes will take. This rationality extends to an awareness of and consideration of risk, including penal sanctions. The second and smaller group is more enmeshed in criminality as a career or lifestyle. Such individuals are more antisocial, less concerned about the consequences of their actions, and less fearful of legal sanctions, including prison.

Deterrent and incapacitation effects may need to be viewed from the perspective of this broad typology. Also important are factors such as age, nature of the offence, and the certainty, severity and celerity of sanctions. For the broader segment of society that is likely to respond to the threat of punishment and moral suasion, it may be that milder, but more certain penalties would constitute the most optimal application of sanctions. From a utilitarian point of view, incapacitating casual or low-rate offenders for long periods is a waste of justice system resources, especially when these individuals may respond to moral appeals and the mere threat of sanctions. Conversely, incapacitation for longer periods may be the only recourse for highly active career criminals who tend not to respond to the threat of sanctions or to moral appeals.

Such variation among offenders has led, over the past 25 years, to occasional calls by influential scholars for the implementation of selective incapacitation strategies; i.e., the neutralization of high-risk offenders based on individual risk factors. However, such preventive confinement is problematic, due to the many prediction errors and undermining of the principles of proportionality and the presumption of innocence. Some predictors (e.g., race or employment history) would be seriously objectionable. Chronic, serious offenders are believed to have an elevated likelihood of detection due to their higher levels of criminal activity and criminal history is believed to be one of the best predictors of recidivism. Consequently, these people might be adequately dealt with under more traditional (retributive) sentencing practices. Courts take the criminal record into account in sentencing and some mandatory sentencing provisions are triggered by a previous conviction.

The present review examined the implementation and impact of MMS, focusing on the last two decades (1980 2000). It relied almost exclusively on American research, due to the dearth of such evaluations in Canada. Initiatives in the United Kingdom, Australia, and Malaysia were also included. This review first examined mandatory sentencing policies that encompassed a broader category of offences. The highly publicized "Three Strikes" law in California is an illustration, as it applies to any felony conviction following two prior convictions for serious crimes. MMS for impaired driving, firearms and drug offences were then examined Finally, this review examined estimates of the impact of hypothetical MMS arrived at by various statistical models. Following the assessment of the impact of MMS on crime, their economic impact, effects on sentencing disparity, and related issues were discussed.

9.2 General Mandatory Sentencing Laws

The evidence was mixed with regard to the impact of more generalized MMS of the "Three Strikes" variety. At best, studies showed modest crime preventive effects. While California showed a sharper decline in crime than other states following implementation of its "Three Strikes" law, communities in that state showed inconsistent effects and studies comparing states with and without such a law show no difference with regard to crime trends. Explanations for the lack of a more dramatic effect include the inconsistent application of such sweeping laws, the small proportion of individuals to whom these laws apply, and the possibility that they provide limited marginal returns as many high-rate offenders may already be incarcerated under existing legislation.

9.3 Mandatory Sentences for Firearms Offences

Enhanced sentences for firearms infractions show some promise, although findings here, too, are inconsistent or unclear. Although a major Canadian evaluation suggested that the introduction in 1977 of the one-year mandatory prison term for the use of a firearm in crime (Section 85 of the *Criminal Code*) was accompanied by a modest decrease in the proportion of homicides and robberies committed by firearms, there was some evidence of a displacement to offences committed by other weapons. A number of serious methodological flaws preclude more definitive assertions about the law's impact. There is evidence that Section 85 has been applied inconsistently and has failed to increase sentence length as judges appear to provide a "going rate" for different crimes, adjusting the sentence for the primary offence downward to compensate for the sentence enhancement. In several American jurisdictions, gun homicides and/or robberies have declined following the introduction of firearm sentence enhancements. The evidence was mixed on the impact of Massachusetts' Bartley-Fox Amendment, a law prescribing a one-year MMS for carrying a gun illegally. Subject to a series of evaluations, this Amendment may have failed to meet expectations due to adaptive behaviour by the police (e.g., searches of suspects became more selective and guns were often confiscated without charges). Perhaps most disconcerting for proponents of firearm sentence enhancements was a study interviewing robbers in Western Australia. That study revealed that the majority of robbers who had used guns indicated they would continue to do so despite their awareness of sentence enhancements and concern about the consequences of repeating their offences.

9.4 Mandatory Sentences for Impaired Driving

There are some methodological impediments to assessing the effects of MMS on impaired driving, as legal sanctions are often accompanied by treatment for alcohol abuse. Further confounding evaluations in this area is the role of educational campaigns. High-profile publicity campaigns tend to accompany new legislative initiatives on impaired driving, making it difficult to sort out the relative importance of deterrent and denunciatory effects. Research that has attempted to isolate these effects has found that people may respond more to the shame associated with impaired driving than to the threat of legal sanctions. However, the level of shame is undoubtedly influenced by the nature and severity of sanctions and accompanying publicity campaigns. ***While the evidence overall underscores the critical role played by vigorous law enforcement and the certainty of punishment in this area, studies provide little reason for optimism with regard to the efficacy of tough sanctions.*** While not unanimous, studies indicate that MMS and sanctions of increasing severity do not appear to reduce recidivism rates or alcohol-related road accidents. One author asserts that impaired driving is a unique offence in that alcohol consumption and, often, abuse is inherent to it. He notes that repeat offenders commit a disproportionate number of these offences and do not tend to respond to punishments (such as license revocations) due to their substance abuse problem.

9.5 Mandatory Sentences for Drug Offences

Severe MMS seem to be least effective in relation to drug offences. Studies using a variety of methodologies seriously question the value of the "drug war" approach. The draconian penalties in Malaysia are routinely circumvented by the judiciary and the tough MMS in the US (both at the state and federal levels) have imprisoned mostly low-level, nonviolent offenders. ***Drug consumption and drug-related crime seem to be unaffected, in any measurable way, by severe MMS.*** Both mathematical modeling techniques and field work arrive at the conclusion that treatment-oriented approaches are more cost effective than harsh prison terms. Most drug dealers operate at a low-level and are not committed to this activity in a single-minded way. MMS are blunt instruments that provide a poor return on taxpayers' dollars because they fail to distinguish between low and high-level, as well as hardcore versus transient dealers. An optimal approach might require a mix of accessible treatment for addicted dealers, employment opportunities for part-time dealers, and tough sentences for hardcore, high-level dealers.

9.6 The Impact of Hypothetical Mandatory Sentencing Policies

Studies examining the crime preventive effects of hypothetical MMS triggered by a violent crime have consistently found that the benefits would be modest relative to the elevated prison costs. This is due to the relatively low number of individuals who would reconvicted on other violent offences during the time these penalties would be in effect. From a utilitarian point of view, such collective incapacitation strategies would needlessly incarcerate many individuals not at risk of reconviction. Selective incapacitation strategies targeting high-rate offenders would be more efficient; however, prediction problems abound and they are unlikely to be implemented due to concerns that they would undermine fundamental legal principles.

9.7 Sentencing Disparity

There is no evidence that either discretion or disparities are reduced by MMS. While judicial discretion in the sentencing process is reduced (not removed), prosecutors play a more pivotal role as their charging decisions become critical. The shift in influence over sentencing from the judicial to the prosecutorial level also represents a loss of transparency in decision-making, as prosecutorial decisions are less open to scrutiny than those made by judges. In California, under the Three Strikes law, prosecutors have been inconsistent in their application of the law from case to case and across jurisdictions. They often ignore "strikes" if they feel that a case deserves leniency. In the US federal system, the only statutory exemptions to MMS apply when defendants have been shown to provide "substantial assistance" in the prosecution of other cases. High-level offenders are more likely to provide useful information and therefore are usually the beneficiaries of such discounts. This situation also undermines the rationale for mandatory sentencing policies in many jurisdictions – targeting drug kingpins and violent offenders.

In California, trial judges have dismissed previous "strikes", arguing that the MMS would have constituted "cruel and unusual" punishment, in violation of the state's constitution. The state's Supreme Court upheld the right of judges to overlook previous convictions on the grounds that the dismissal of cases is a judicial rather than an executive function. Such rulings affirming the separation of powers between the judicial and executive branches, and the right of judges to dismiss prior convictions in the interests of justice may be inevitable consequences of draconian mandatory sentencing policies. Furthermore, racial disparities in sentencing have been exacerbated by MMS in the US, both at the federal and state levels. Taken together, therefore, prosecutorial and judicial practices, inter-jurisdictional differences in these practices, advantages to high-level offenders, and racial disparities indicate that MMS do not necessarily provide for more equitable, consistent, or predictable sentencing.

It has also been argued that the uniformity in sentencing ostensibly imposed under MMS may create other disparities as different offenders are treated similarly. By focusing exclusively on the nature of the infraction, the offender's degree of culpability and role in the crime is ignored. Women, for example, may be pressured into participating in crimes by abusive partners. Also, gender neutral sentencing may place a special burden on women due to their familial responsibilities and the dearth of programs in correctional facilities for women.

Disparities may be exacerbated by MMS in another way. To the extent that sentences under mandatory sentencing policies are more severe, the gap may increase between cases in which charges are bargained down and those that receive a lengthy MMS.

9.8 Some Adverse Effects of Mandatory Sentences

MMS calling for lengthy prison terms are likely to carry massive costs. Jury trials increase dramatically, as defendants usually have little incentive to plead guilty. More defence counsel, prosecutorial, and judicial resources, as well as court staff, are required. The pre-trial jail population is likely to increase. Massive increases in prison construction and operating costs have been observed and projected. In some jurisdictions, these increases have led to the early releases of those not subject to MMS, thereby weakening the justice system's response to other crimes. Lengthy MMS will also create a progressively older prison population, with its accompanying costs.

MMS, such as the Three Strikes and federal drug laws in the US, have produced some grossly disproportionate sentences. When laws are judged by a broad array of justice system actors and by the public to be excessively harsh, compensating behaviours inevitably arise. The experience in California with the Three Strikes law suggests that instances in which the law is circumvented by prosecutors and even judges are numerous. Such laws may also lead to more desperate actions among fugitives seeking to avoid these harsh sentences. Shootouts with the police and attacks/threats against witnesses may increase with such laws. Correctional facilities, too, may be more difficult to manage where MMS remove incentives for cooperative behaviour by removing credits for good behaviour.

9.9 Concluding Remarks

There is a conspicuous absence of Canadian research on MMS, given the number of infractions carrying such penalties and the number of private members' bills, in the last two years, seeking to introduce MMS. Especially noteworthy is the lack of any systematic evaluation of the ten, four-year MMS for certain offences involving a firearm introduced with the enactment of Bill C-68 in 1995. Also noteworthy is the absence of evaluations of mandatory sentencing provisions relating to impaired driving.

The evaluation of these and other mandatory sentencing provisions ought to examine their implementation, effects on sentencing patterns, and crime rates, as well as their fiscal costs. The level of public awareness of these penalties also must be ascertained, as such awareness is a precondition of deterrent and denunciatory effects.

Long-term projections of the fiscal costs and crime preventive benefits of MMS are complex undertakings involving many assumptions. It is critical to distinguish between the lengthy minimum prison terms required by laws such as "Three Strikes" and the more modest penalties for offences such as impaired driving, as the challenges posed by the former are considerably more daunting. Mandatory life sentences triggered by a third offence, with little regard for the nature of that offence, clearly have many pitfalls (see previous section). The use of MMS as instruments in the "War on Drugs" also has many limitations, especially when they are triggered by drug quantity alone. Offender motivation and substance abuse, as well as their position in criminal enterprises, ought to be considered if proportional and effective sentences are to be imposed.

MMS show somewhat more promise with regard to impaired driving and firearms offences. Mandatory fines and licence restrictions may create more predictable consequences to which the casual impaired driver may respond. These offenders seem to respond to measures increasing the certainty of punishment, as well as accompanying publicity campaigns that may increase the level of shame associated with this behaviour. On the other hand, repeat offenders with substance abuse problems appear to be less responsive to these measures.

Firearms infractions, too, have responded to MMS in some contexts. In Canada, most of the MMS for firearms offences apply to their unlawful use during the commission of a criminal offence. These provisions are thus meant as an add-on or enhanced sentence to that imposed on the primary offence. One major concern is that the courts do not treat these mandatory minima as add-ons but, rather, tend to impose an overall sentence that may not exceed that imposed for the same offence prior to the introduction of the mandatory penalty. Another concern is whether these MMS will serve as a marginal deterrent in relation to those prepared to commit the primary offence. Thus, if an individual is prepared to commit a robbery – a crime carrying a maximum sentence of imprisonment for life – will he now be deterred by a four-year minimum penalty, assuming that it is usually imposed? Even if he is deterred from using a gun (a questionable assumption given some Australian research), he may substitute another weapon in the commission of the same offence.

A critical issue with regard to the potential deterrent and incapacitative effects of MMS is the pool of offenders to whom these penalties apply. More persistent and active offenders are generally more difficult to deter with the threat of sanctions or to influence through moral

appeals. Deterrence will therefore be more in evidence in relation to those offences usually committed by more casual or opportunistic offenders. Incapacitative effects, on the other hand, will be more pronounced in relation to those crimes most often committed by highly active offenders. From a utilitarian point of view, incarcerating occasional, non-violent offenders, for substantial periods, constitutes a colossal waste of justice system resources.

The marginal benefits of incapacitation are also dependent on the number of highly active offenders still at liberty when MMS are introduced; that is, the extent to which the existing sentencing regime was successful in neutralizing these offenders. Incapacitative effects also diminish with age, while the costs of custodial sentences increase as offenders get older. The use of incarceration as a preventive measure, therefore, must be finely tuned or its counterproductive effects may well outweigh its benefits. Therefore, MMS should not be introduced merely to placate a political constituency or without regard to a thorough understanding of the infractions or offenders for whom they are intended.

References

Anderson, J. (1993). *A longitudinal simulation study of incapacitation effects.* Stockholm: University of Stockholm.

Auerhahn, K. (1999). Selective incapacitation and the problem of prediction. *Criminology*, 703.

Austin, J. (1993). *Reforming Florida's unjust, costly, and ineffective sentencing laws.* San Francisco: National Council on Crime and Delinquency.

Austin, J. (1996). The effect of three strikes and you're out on corrections. In D. Sichor & D. Sechrest (Eds.), *Three strikes and you're out: Vengeance as public policy* (pp. 155-173). Thousand Oaks, CA: Sage.

Bagaric, M. (2000). Consistency and fairness in sentencing - The splendor of fixed penalties. *California Criminal Law Review, 2*, 1.

Bailey, W.C. (1998). Deterrence, brutalization, and the death penalty: Another examination of Oklahoma's return to capital punishment. *Criminology, 36*(4), 711.

Bailey, W.C. & Peterson, R. (1994). Murder, capital punishment, and deterrence: A review of the evidence and an examination of police killings. *Journal of Social Issues, 50*(2), 53.

Bales, W.D. & Dees, L.G. (1992). Mandatory minimum sentencing in Florida: Past trends and future implications. *Crime and Delinquency, 38*, 309.

Baylson, M. (1993). Mandatory minimum sentences: A federal prosecutor's viewpoint. *Federal Bar News and Journal, 40*, 167.

Beha, J. (1977a). The impact of a mandatory minimum prison sentence for the illegal carrying of a firearm on the use of firearms and the administration of criminal justice in Boston - Part I. *Boston University Law Review, 57*, 96.

Beha, J. (1977b). The impact of a mandatory minimum prison sentence for the illegal carrying of a firearm on the use of firearms and the administration of criminal justice in Boston - Part II. *Boston University Law Review, 57*, 289.

Benekos, P.J. & Merlo, A.V. (1995). Three strikes and you're out: The political sentencing game. *Federal Probation, 59*, 3.

Beres, L.S. & Griffith, T.D. (1998). Do three strike laws make sense? Habitual offender statutes and criminal incapacitation. *Georgetown Law Journal*, 87, 103.

Bogan & Factor (1995). Oregon voters' sentencing initiative creates policy dilemma. In *Overcrowded times: Solving the prison problem.* Castine, Maine: Castine Research Corporation.

Boland, B. (1978). Incapacitation of the dangerous offender: The arithmetic is not so simple. *Journal of Research in Crime and Delinquency*, 15, 126.

Bowers, M.W. (1988). Sumner v. Shuman: Mandatory death sentence statutes for prisoners who murder. *Western State University Law Review, 15*, 653.

Broadhurst, R. & Loh, N. (1993). The phantom of deterrence: The crime (serious and repeat offender) sentencing act. *Australia and New Zealand journal of Criminology, 26*, 251.

Brown, B. (1997). CCTV in three town centers in England. In R.V. Clarke (Ed.), *Situational crime prevention: Successful case studies* (pp. 167-182). New York: Harrow and Heston.

Brown, M. (1998). Serious violence and dilemmas of sentencing: A comparison of three incapacitation policies. *Criminal Law Review*, 710.

Canadian Association of Elizabeth Fry Societies. (2001). *Reforming Criminal Code defenses: Provocation, self-defense and defense of property.* Ottawa.

Canadian Sentencing Commission. (1987). *Sentencing reform: A Canadian approach.* Ottawa: Supply and Services Canada.

Capune, W.G. (1988). Selective incapacitation: A review of the law and the literature. *Criminal Justice Journal, 10*, 187.

Carlson, C. & Nidey, F.J. (1995). Mandatory penalties, victim cooperation, and the judicial processing of domestic abuse cases. *Crime and Delinquency*, 132.

Casey, K.A. & Wiatrowski, M.D. (1996). Women offenders and three strikes and you're out. In D. Sichor & D. Sechrest (Eds.), *Three strikes and you're out: Vengeance as public policy* (pp. 222-243). Thousand Oaks, CA: Sage.

Caulkins, J.P., Rydell, C.P., Schwabe, W.L. & Chiesa, J. (1997). *Mandatory minimum drug sentences.* Santa Monica, CA: Rand.

Chaneles, S. (1987). Growing old behind bars. *Psychology Today*, 47.

Clarke, R.V. (1997). *Situational crime prevention: Successful case studies* (2nd edition). New York: Harrow and Heston.

Cochran, J.K., Chamlin, M.B. & Seth, M. (1994). Impact assessment of Oklahoma's return to capital punishment. *Criminology, 32*(1), 107.

Cohen, J. & Canela-Cacho, J. (1994). Incarceration and violent crime: 1965-1988. In A.J. Reiss Jr. & J. Roth (Eds.), *Understanding and preventing violence: Consequences and control* (Vol. 4, pp. 296-388). Washington, DC: National Academy Press.

Crouch, B.M. (1993). Is incarceration really worse? Analysis of offenders' preferences for prison over probation. *Justice Quarterly, 10*(1), 67.

Cushman, R.C. (1996). Effect on a local criminal justice system. In D. Sichor & D. Sechrest (Eds.), *Three strikes and you're out: Vengeance as public policy* (pp. 90-116). Thousand Oaks, CA: Sage.

Davies, F.G. (2000). Automatic life sentence for second serious offence. *The Journal of Criminal Law, 64,* 190.

Dershowitz, A.M. (1973). Preventive confinement: A suggested framework for constitutional analysis. *Texas Law Review, 51,* 1277.

Deutsch, S.J. & Alt, F.B. (1977). The effect of Massachusetts' gun control law on gun related crimes in the city of Boston. *Evaluation Quarterly,* 1, 543.

Duster, T. (1995). The new crisis of legitimacy in controls, prisons, and legal structures. *The American Sociologist,* 20.

Free, M.D. (1997). The impact of federal sentencing reforms on African Americans. *Journal of Black Studies, 28,* 268.

Gabor, T. (1985). Incapacitation policies: Their applicability to the Canadian situation. *Canadian Journal of Criminology, 27,* 409.

Gabor, T. (1994). *Everybody does it: Crime by the public.* Toronto: University of Toronto Press.

Gabor, T. (1994b). *The impact of the availability of firearms on violent crime, suicide, and accidental death: A review of the literature with special emphasis on the Canadian situation.* Ottawa: Department of Justice Canada.

Gabor, T., Baril, M., Cusson, M., Elie, D., Leblanc, M. & Normandeau, A. (1987). *Armed robbery: Cops, robbers, and victims.* Springfield, IL: Charles Thomas.

Gainsborough, J. & Mauer, M. (2000). *Diminishing returns: Crime and incarceration in the 1990s.* Washington, DC: The Sentencing Project.

Galbo, A. (1985). Death after life: The future of New York's mandatory death penalty for murders committed by life-term prisoners. *Fordham Urban Law Journal, 13,* 597.

Gendreau, P., Andrews, D.A., Goggin, C. & Chanteloupe, F. (1992). *The development of clinical and policy guidelines for the prediction of criminal behavior in criminal justice settings.* Unpublished manuscript, Department of Psychology, University of New Brunswick.

Gendreau, P., Goggin, C. & Cullen, F.T. (1999). *The effects of prison sentences on recidivism.* Ottawa: Solicitor General Canada.

Grasmick, H.G., Bursik Jr., Robert, J. & Arneklev (1993). Reduction in drunk driving as a response to increased threats of shame, embarrassment, and legal sanctions. *Criminology, 31*(1), 41.

Green, G. (1986). General deterrence and television cable crime: A field experiment in social crime. *Criminology, 23,* 629.

Greene, M. (1980). *Incapacitation effect of imprisonment policies on crime.* Pittsburgh: Carnegie-Mellon University, Doctoral Dissertation.

Greenberg, D.F. & Larkin, N.J. (1998). The incapacitation of criminal opiate users. *Crime and Delinquency, 44,* 205.

Greenfield, L. (1985). *Examining recidivism* Washington, DC: Government Printing Office.

Greenwood, P.W. & Abrahamse, A. (1982). *Selective incapacitation.* Santa Monica, CA: Rand.

Greenwood, P.W., Rydell, C.P., Abrahamse, A.F., Caulkins, J.P., Chiesa, J., Model, K.E. & Klein, S.P. (1996). Estimated benefits and costs of California's new mandatory-sentencing law. In D. Sichor & D. K. Sechrest (Eds.), *Three strikes and you're out: Vengeance as public policy* (pp. 53-89). Thousand Oaks, CA: Sage.

Grube, J.W., & Kearney, K.A. (1983). A 'mandatory' jail sentence for drinking and driving. *Evaluation Review, 7,* 235.

Hagedorn, J.M. (1994). Homeboys, dope fiends, legits, and new jacks. *Criminology, 32,* 197.

Hansen, M. (1999). Mandatories going, going...gone. *ABA Journal, 85,* 14.

Harding, R.W. (1990). Rational choice gun use in armed robbery: The likely deterrent effect on gun use of mandatory additional imprisonment. *Criminal Law Forum, 1,* 427.

Harring, S.L. (1991). Death, drugs, and development: Malaysia's mandatory death penalty for traffickers and the international war on drugs. *Columbia Journal of Transnational Law, 29,* 365.

Hartnagel, T.F. (2000). Correlates of criminal behaviour. In R. Linden (Ed.), *Criminology: A Canadian Perspective* (4th ed., pp. 94-136). Toronto: Harcourt Brace.

Heumann, M. & Loftin, C. (1979). Mandatory sentencing and the abolition of plea bargaining: The Michigan felony firearm statute. *Law and Society Review, 13,* 393.

Harris, J.C. & Jesilow, P. (2000). It's not the old ball game: Three strikes and the courtroom workgroup. *Justice Quarterly, 17*(1), 185.

Hatsukami, D.K. & Fischman, M.W. (1996). Crack cocaine and cocaine hydrochloride: Are the differences myth or reality? *JAMA, 276,* 1580.

Horney, J. & Marshall, I. (1992). Risk perceptions among serious offenders: The role of crime and punishment. *Criminology, 30,* 575.

Howe, E.S., & Brandau, C.J. (1988). Additive effects of certainty, severity, and celerity of punishment on judgments of crime deterrence scale value. *Journal of Applied Social Psychology, 18,* 796.

Innes, C. (1988). *Profile of state prison inmates 1986*. Washington, DC: Bureau of Justice Statistics.

Johnson, P.M. (1978). The role of penal quarantine in reducing violent crime. *Crime and Delinquency, 24*, 465.

Kenkel, D.S. (1993). Drinking, driving, and deterrence: The effectiveness and social costs of alternative policies. *Journal of Law and Economics, 36*(2), 877.

Kingsnorth, R.F., Alvis, L. & Gavia, G. (1993). Specific deterrence and the DUI offender: The impact of a decade of reform. *Justice Quarterly, 10*(2), 165.

Klepper, S. & Nagin, D. (1989). The deterrent effect of perceived certainty and severity of punishment revisited. *Criminology, 26*, 721.

Lacasse, C. & Payne, A.A. (1999). Federal sentencing guidelines and mandatory minimum sentences: Do defendants bargain in the shadow of the judge. *Journal of Law and Economics, 42*, 245.

Laing, J. (1997). The likely impact of mandatory and minimum sentences on the disposal of mentally disordered offenders. *The Journal of Forensic Psychiatry, 8*, 504.

Loftin, C., Heumann, M. & McDowall, D. (1983). Mandatory sentencing and firearms violence: Evaluating an alternative to gun control. *Law and Society Review, 17*(2), 287.

Loftin, C. & McDowall, D. (1984). The deterrent effects of the Florida felony firearm law. *Journal of Criminal Law and Criminology, 75*(1), 250.

Markel, C. (1996). A swing and a miss: California's three strikes law. *Whittier Law Review, 17*, 651.

Marvell, T.B. & Moody, C.E. (1995). The impact of enhanced prison terms for felonies committed with guns. *Criminology, 33*(2), 247.

Marvell, T.B. & Moody, C.E. (1996). Determinate sentencing & abolishing parole: The long-term impacts on prisons and crime. *Criminology, 34*(1), 107.

Marvell, T.B. & Moody, C.E. (1996b). Specification problems, police levels and crime rates. *Criminology, 34*(1), 609.

Mathiesen, T. (1998). Selective incapacitation revisited. *Law and Human Behavior, 22*, 455.

Maxwell, S.R. (1999). Conservative sanctioning and correctional innovations in the United States: An examination of recent trends. *International Journal of the Sociology of Law, 27*, 401.

McDowall, D., Loftin, C. & Wiersema, B. (1992). A comparative study of the preventative effects of mandatory sentencing laws for gun crimes. *Journal of Criminal Law and Criminology, 83*(2), 378.

McPheters, L.R., Mann, R. & Schlagenhauf, D. (1984). Economic response to a crime deterrence program: Mandatory sentencing for robbery with a firearm. *Economic Inquiry, 22*, 550.

Meredith, C., Steinke, B. & Palmer, S.A. (1994). Research on the application of section 85 of the criminal code of Canada. Ottawa: Department of Justice Canada.

Miller, J.L. & Anderson, A.B. (1986). Updating the deterrence doctrine. *Journal of Criminal Law and Criminology, 77*, 418.

Morgan, N. (2000). Mandatory sentences in Australia: Where have we been and where are we going. *Criminal Law Journal, 24*, 164.

Nagin, D.S. (1998). Deterrence and incapacitation. In M. Tonry (Ed.), *The handbook of crime and punishment* (pp. 345-368). New York: Oxford University Press.

Nagin, D. & Paternoster, R. (1993). Enduring individual differences and rational choice theories of crime. *Law and Society Review, 27*, 467.

Nienstedt, B. (1990). The policy effects of a DWI law and a publicity campaign. In R. Surette (Ed.), *The media and criminal justice policy* (pp. 193-203). Springfield, IL.: Charles Thomas.

Oliss, P. (1995). Mandatory minimum sentencing: Discretion, the safety valve, and the sentencing guidelines. *University of Cincinnati Law Review, 63*, 1851.

Owens, M.W. (1995). California's three strikes law: Desperate times require desperate measures - But will it work? *Pacific Law Journal, 26*, 881.

Palys, T. & Divorski, S. (1986). Explaining sentence disparity. *Canadian Journal of Criminology, 28*, 347.

Perera, S. (2000). Australia: Racialised punishment and mandatory sentencing. *Race and Class, 42*, 73.

Petersilia, J. (1980). Criminal career research: A review of recent evidence. In N. Morris & M. Tonry (Eds.), *Crime and justice: A review of research, Vol. 2*. Chicago: University of Chicago Press.

Petersilia, J. (1990). When probation becomes more dreaded than prison. *March Federal Probation*, 23.

Petersilia, J. & Deschenes, E.P. (1994). What punishes? Inmates rank the severity of prison vs. intermediate sanctions. *Federal Probation, 58*, 3.

Petersilia, J. & Greenwood, P.W. (1978). Mandatory prison sentences: Their projected effects on crime and prison population. *Journal of Criminal Law and Criminology, 69*, 604-615.

Pierce, G.L., & Bowers, W.J. (1990). The Bartley-Fox gun law's short-term impact on crime in Boston. In N.A. Weiner, M.A. Zahn, & R.J. Sagi, (Eds.), *Violence: Patterns, causes, public policy*. New York: Harcourt Brace Jovanovich.

Provine, D.M. (1998). Too many black men: The sentencing judge's dilemma. *Law and Social Inquiry, 23*, 823.

Radelet, M.L. & Borg, M.J. (2000). The changing nature of death penalty debates. *Annual Review of Sociology, 26*, 43.

Raeder, M.S. (1993). 'Gender neutral' sentencing wreaks havoc in the lives of women offenders and their children. *Criminal Justice, 8*, 21.

Rehnquist, W. (1993). Cited in an editorial entitled: The problems with mandatory minimum sentences. *Judicature, 77*, 124.

Roberts, J.V. (1999). Sentencing trends and sentencing disparity. In J.V. Roberts & D.P. Cole (Eds.), *Making sense of sentencing*. Toronto: University of Toronto Press, Inc.

Roche, D. (1999). Mandatory sentencing: Trends and issues in crime and criminal justice. *Australian Institute of Criminology, 138*.

Ross, H.L. (1982). *Deterring the drinking driver: Legal policy and social control*. Lexington, Mass.: Heath.

Ross, H.L. & Voas, R.B. (1990). The new Philadelphia story: The effects of severe punishment for drunk driving. *Law and Policy, 12*, 51.

Rossman, D., Froyd, P., Pierce, G.L., McDevitt, J. & Bowers, W.J. (1980). Massachusetts' mandatory minimum sentence law: Enforcement, prosecution, and defense impact. *Criminal Law Bulletin, 16*, 150.

Sager, L. (1999). Advocating for change in mandatory minimum sentencing. *Thomas M. Cooley Law Review, 16*, 27.

Scarff, E. (1983). *Evaluation of the Canadian gun control legislation*. Ottawa: Supply and Services Canada.

Scarfone, A.C. (1986). The mandatory death penalty for murder by lifers: Foregoing procedural safeguards on the illusory promise of deterrence. *Syracuse Law Review, 36*, 1303.

Schultz, D. (2000). No joy in Mudville tonight: The impact of "three strike" laws on state and federal corrections policy, resources, and crime control. *Cornell Journal of Law and Public Policy, 9*, 557.

Shavell, S. (1992). A note on marginal deterrence. *International Review of Law and Economics, 12*, 345.

Sherman, L.W. (1990). Police crackdowns: Initial and residual deterrence. In M. Tonry, & N. Morris (Eds.), *Crime and Justice: A Review of Research, Vol. 12*. Chicago: University of Chicago Press.

Siegel, L.J. & McCormick, C. (1999). *Criminology in Canada*. Toronto: Nelson.

Simourd, L. & Andrews, D.A. (1994). Correlates of delinquency: A look at gender differences. *Forum on Corrections Research, 6*, 26.

Spelman, W. (1995). The severity of intermediate sanctions. *Journal of Research in Crime and Delinquency, 32*(2), 107.

Spencer, M.P. (1995). Sentencing drug offenders: The incarceration addiction. *Villanova Law Review, 40*, 335.

Stolzenberg, L. & D'Alessio, S.J. (1997). Three strikes and you're out: The impact of California's new mandatory sentencing law on serious crime rates. *Crime and Delinquency, 43*, 457.

Taxman, F.E. & Piquero, A. (1998). On preventing drunk driving recidivism: An examination of rehabilitation and punishment approaches. *Journal of Criminal Justice, 26*(2), 129.

Tittle, C. & Rowe, A. (1974). Certainty of arrest and crime rates: A test of the deterrence hypothesis. *Social Forces, 52*, 455.

Tonry, M. (1992). *Mandatory penalties, crime and justice: A review of the research...Vol. 16*. (pp. 243-274).

Tonry, M. (1996). *Sentencing matters*. New York: Oxford.

U.S. Federal Judicial Center. (1994). *The consequences of mandatory minimum prison terms: A summary of recent findings*.

U.S. Sentencing Commission. (1991). *Special report to congress: Mandatory minimum penalties in the federal criminal justice system*.

Van Dine, S., Dinitz, S. & Conrad, J.P. (1979). *Restraining the wicked*. Lexington, Mass: Lexington Books.

Visher, C. (1986). The Rand inmate survey: A reanalysis. In A. Blumstein, J. Cohen, J. Roth & C. Visher (Eds.), *Criminal careers and career criminals*. Washington, DC: National Academy Press.

Vitiello, M. (1997). Three strikes: Can we return to rationality? *Journal of Criminal Law and Criminology, 87*, 395.

Von Hirsch, A., Bottoms, A.E., Burney, E. & Wikstrom, P.O. (1999). *Criminal deterrence and sentence severity: An analysis of recent research*. Oxford: Hart.

Wallace, H.S. (1993). Mandatory minimums and the betrayal of sentencing reform: A legislative Dr. Jekyll and Mr. Hyde. *Federal Probation, 57*, 9.

Wichiraya, T. (1996). *Simple theory, hard reality: The impact of sentencing reforms on courts, prisons, and crime*. Albany: State University of New York Press.

Wolfgang, M. (1958). *Patterns in criminal homicide*. Philadelphia: University of Pennsylvania Press.

Wolfgang, M., Figlio, R.M. & Sellin, T. (1972). *Delinquency in a birth cohort*. Chicago: University of Chicago Press.

Woolredge, J. (1996). Research note: A state-level analysis of sentencing policies and inmate crowding in state prisons. *Crime and Delinquency, 42*(2), 456.

Jiang, W. & Liska, A. (1993). The certainty of punishment: A reference group effect and its functional form. *Criminology, 31*, 447.

Yu, J. (1994). Punishment celerity and severity: Testing a specific deterrence model on drunk driving recidivism. *Journal of Criminal Justice, 22*, 355.

Zedlewski, E. (1983). Deterrence findings and data sources: A comparison of the uniform crime rates and the national crime surveys. *Journal of Research in Crime and Delinquency, 20*, 262.

Zimring, F. E. & Hawkins, G. (1995). *Incapacitation: Penal confinement and the restraint of crime.* New York: Oxford University Press.

APPENDIX A: Mandatory Minimum Penalties in the 2001 *Criminal Code*

Offence	Section	Minimum	Maximum
Driving while impaired	s. 253(a)	14 days[1]	5 years[2]
Blood alcohol over .08	s. 253(b)	14 days[3]	5 years[4]
Fail/refuse to provide breath sample	s. 254(5)	14 days[5]	5 years[6]
Betting, pool-selling, book-making	s. 202	14 days[7]	2 years
Placing bets on behalf of others	s. 203	14 days[8]	2 years
High treason	s. 47(1)	Life[9]	Life
First degree murder	s. 231(1)-(6.1)	Life[10]	Life
Second degree murder	s. 231(7)	Life[11]	Life
Living off avails of child prostitution	s. 212(2.1)	5 years	14 years
Using a firearm during commission of offence	s. 85(1)	1 year[12]	14 years
Using imitation firearm during offence	s. 85(2)	1 year[13]	14 years
Criminal negligence causing death – Firearm	s. 220(a)	4 years	Life
Manslaughter – Firearm	s. 236(a)	4 years	Life
Attempted murder – Firearm	s. 239	4 years	Life
Causing bodily harm with intent – Firearm	s. 244	4 years	14 years
Sexual assault – Firearm	s. 272(1)	4 years	14 years
Aggravated sexual assault – Firearm	s. 273(1)	4 years	14 years

[1] This penalty pertains to a second conviction. A ninety-day minimum penalty is in place for subsequent convictions. There is no minimum for a first conviction.
[2] This is a hybrid offence, the 5-year maximum pertains to charges that are proceeded by way of indictment. The maximum penalty for a summary charge is 6 months.
[3] See note 1.
[4] See note 2.
[5] See note 1.
[6] See note 2.
[7] See note 1.
[8] *Ibid.*
[9] This is a life sentence with the minimum parole eligibility set at 25 years.
[10] This is a life sentence with the minimum parole eligibility set at 25 years.
[11] This is a life sentence with the minimum parole eligibility set at 10 years.
[12] This penalty pertains to the first conviction under this section. Subsequent convictions carry a 3-year mandatory minimum penalty. The maximum remains set at 14 years for subsequent convictions. In addition, the sentence for a conviction under this section is to be served consecutively to any other punishment imposed arising out of the same event or series of events.
[13] *Ibid.*

Offence	Section	Minimum	Maximum
Kidnapping - Firearm	s. 279(1)	4 years	Life
Hostage taking - Firearm	s. 279.1(1)	4 years	Life
Robbery - Firearm	s. 344	4 years	Life
Extortion - Firearm	s. 346(1.1)	4 years	Life
Possession of firearm knowing it is unauthorized	s. 92(1)	1 year[14]	10 years
Possession of weapon/device/ammunition knowing its possession is unauthorized	s. 92(2)	1 year[15]	10 years
Possession of prohibited/restricted firearm with ammunition	s. 95(1)	1 year[16]	10 years
Possession of weapon obtained by commission of an offence	s. 96(1)	1 year[17]	10 years
Weapons trafficking	s. 99(1)	1 year	10 years
Possession for purpose of weapons trafficking	s. 100(1)	1 year	10 years
Making weapon into automatic fire	s. 102(1)	1 year[18]	10 years
Importing/Exporting firearm/prohibited weapon/restricted weapon/prohibited device or prohibited ammunition	s. 103(1)	1 year	10 year

[14] This penalty pertains to the first conviction under this section. Subsequent convictions carry a 2-year less a day mandatory minimum penalty. The maximum remains set at 10 years for subsequent convictions.
[15] *Ibid.*
[16] This is a hybrid offence. The 1 year minimum and 10 year maximum pertains to charges that are proceeded by way of indictment. There is no minimum for a summary conviction and the maximum penalty for a summary charge is 1 year.
[17] *Ibid.*
[18] *Ibid.*

APPENDIX B: Private Members' Bills from 1999-2001[19]

Year	Penalty	Offence	Bill #
1999	2 years	Second and subsequent convictions of breaking and entering a dwelling house	C-219
	2 years	Second and subsequent convictions of breaking and entering a dwelling house	C-475
	5 years	Sexual interference or invitation to sexual touching of children under the age of 14	C-504
	10 years	Using a firearm during the commission of an offence	C-516
	20 years	Discharging a firearm during the commission of an offence	C-516
	25 years	Discharging a firearm during the commission of an offence that results in the wounding, maiming or disfiguring of anyone not involved in the offence	C-516
	10 years	Using a firearm during the commission of an offence	C-484
	20 years	Discharging a firearm during the commission of an offence	C-484
	25 years	Discharging a firearm during the commission of an offence and injuring anyone not involved in the offence	C-484
2000	Life	Third conviction for a violent offence	C-265
	4 years	Second and subsequent convictions of theft of an automobile	C-426
	10 years	Using a firearm during the commission of an offence	C-441
	20 years	Discharging a firearm during the commission of an offence	C-441
	25 years	Discharging a firearm during the commission of an offence that results in the wounding, maiming or disfiguring of anyone not involved in the offence	C-441
2001[20]	2 years	Sexual touching of a person under 14 years of age	C-208
	2 years	Invitation to sexual touching of person under 14 years of age	C-208
	4 years	Second and subsequent convictions of theft of motor vehicle	C-250
	1 year	Trafficking in a controlled substance within 500 metres of a school	C-255
	2 years	Second and subsequent convictions of breaking and entering a dwelling house	C-290
	Life	Second conviction for a violent offence	C-291

[19] The bills included in this year are only for January 29, 2001 to March 2, 2001.
[20] The bills included in this year are only for January 29, 2001 to March 31, 2001.